EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(30)

85-1379-ATX Title: Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, et al., Appellants
v.
Mike Synar, Member of Congress, et al.

tus: GRANTED

keted:
ruary 18, 1986 Court: United States District Court for the District of Columbia

e:
85-1378 Counsel for appellant: Ross, Steven R.
85-1377
also: Counsel for appellee: Morrison, Alan B.

ry	Date	Note	Proceedings and Orders
	Feb 18 1986	G	Statement as to jurisdiction filed.
	Feb 18 1986	G	Motion of the parties to dispense temporarily with printing and to set an expedited briefing schedule and argument date filed.
	Feb 18 1986		DISTRIBUTED. February 21, 1986
	Feb 19 1986	X	Memorandum of appellee National Treasury Employees Union filed. VIDED.
	Feb 19 1986	X	Memorandum of appellees Mike Synar, Member of Congress, et al., in response filed. VIDED.
	Feb 19 1986	X	Memorandum of appellee United States filed. VIDED.
	Feb 24 1986		Motion of the parties to dispense temporarily with printing and to set an expedited briefing schedule and argument date GRANTED.
	Feb 24 1986		PROBABLE JURISDICTION NOTED. The case is consolidated with 85-1377 and 85-1378, and a total of one hour is allotted for oral argument. **
	Mar 12 1986		Joint appendix filed. VIDED.
	Mar 14 1986		SET FOR ARGUMENT, Wednesday, April 23, 1986. (1st case)
	Mar 17 1986		Five lodgings, 10 copies, received.
	Mar 14 1986	G	Motion of National Treasury Employees Union for leave to add an individual party plaintiff filed.
9	Mar 19 1986		Brief of appellant U. S. Senate filed. VIDED.
0	Mar 19 1986		Brief amicus curiae of National Tax Limitation Committee, et al. filed. VIDED.
1	Mar 19 1986		Brief amicus curiae of Howard H. Baker, Jr. filed. VIDED.
2	Mar 19 1986		Brief of appellant Bowsher, Comptroller Gen. filed. VIDED.
3	Mar 19 1986		Brief of appellant O'Neill, Speaker of U.S. filed. VIDED.
4	Mar 24 1986		CIRCULATED.
5	Mar 24 1986		DISTRIBUTED. March 28, 1986. (Motion of Natl. Treasury Employees union for leave to add indiv. party plaintiff).
6	Mar 27 1986	G	Motion of the parties for divided argument filed.
7	Mar 31 1986		Motion of National Treasury Employees Union for leave to add an individual party plaintiff GRANTED.
8	Mar 28 1986		Record filed.
9	Mar 25 1986		Application of the S. G. for leave to file brief on the merits in excess of page limitation filed, and order
0	Mar 25 1986		granting same by Burger, CJ., on March 28, 1986. Not to

y	Date	Note	Proceedings and Orders
			exceed 60 pages.
	Apr 7 1986		Motion of the parties for divided argument GRANTED.
	Apr 9 1986	X	Brief amicus curiae of Coalition for Health Funding, et al. filed. VIDED.
	Apr 9 1986	X	Brief of appellees Synar, Member of Congress, et al. filed. VIDED.
	Apr 9 1986	X	Brief of appellee National Treasury Employees Union filed. VIDED.
	Apr 9 1986	X	Brief amicus curiae of Natl. Federation of Federal Employees filed. VIDED.
	Apr 9 1986	X	Brief amicus curiae of William H. Gray, III filed. VIDED.
	Apr 9 1986	X	Brief of appellee United States filed. VIDED.
	Apr 9 1986	X	Brief amicus curiae of AFL-CIO, et al. filed. VIDED.
	Apr 11 1986	G	Motion of Edward Blankstein for leave to file a brief as amicus curiae, out-of-time, filed.
	Apr 11 1986	G	Motion of American Jewish Congress for leave to file a brief as amicus curiae, out-of-time, filed.
	Apr 16 1986	X	Reply brief of appellant United States filed. VIDED.
	Apr 16 1986	X	Reply brief of appellant Charles Bowsher, Comptroller filed. VIDED.
	Apr 16 1986	X	Reply brief of appellants Speaker and Bipartisan Leadership Group of the House filed. VIDED.
	Apr 16 1986	X	Reply brief of appellant U.S. Senate filed. VIDED.
	Apr 21 1986		Motion of Edward Blankstein for leave to file a brief as amicus curiae, out-of-time, GRANTED.
	Apr 21 1986		Motion of American Jewish Congress for leave to file a brief as amicus curiae, out-of-time, GRANTED.
	Apr 16 1986		Application of the Comptroller General of the U.S. for leave to file a reply brief in excess of the page
	Apr 16 1986		limitation filed (A-734), and order granting same by Burger, CJ, on April 17, 1986. The brief may not exceed
	Apr 16 1986		25 pages.
	Mar 28 1986		Record filed.
	Apr 23 1986		ARGUED.

EDITOR'S NOTE

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No. 85-1379

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, et al.,

Appellants,

v.

MIKE SYNAR, Member of Congress, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

Steven R. Ross*
General Counsel to the Clerk

Charles Tiefer
Deputy General Counsel to the Clerk

Michael L. Murray
Assistant Counsel to the Clerk

Janina Jaruzelski
Assistant Counsel to the Clerk

U.S. House of Representatives
The Capitol, H-105
Washington, D.C. 20515
(202) 225-9700

* Counsel of Record

QUESTION PRESENTED

The Balanced Budget and Emergency Deficit Control Act of 1985 requires the Comptroller General, an independent officer appointed by the President with the advice and consent of the Senate to a fixed term of office, to perform certain factfinding functions. Does the separation of powers doctrine require a declaration that the Act is unconstitutional in light of the fact that the 1921 statute creating the office of Comptroller General included language which would permit the removal of the Comptroller General by the adoption, through the regular and complete statutory enactment process, of a joint resolution?

PARTIES IN THE CASE BELOW

This appeal is taken from two cases which were consolidated in the United States District Court for the District of Columbia. The cases involve virtually identical issues and this jurisdictional statement encompasses both cases as permitted by Rule 10.6 of the Rules of the Supreme Court.

The plaintiffs in Civil Action No. 85-3945 are Mike Synar, Gary Ackerman, Albert Bustamante, Silvio Conte, Don Edwards, Vic Fazio, Robert Garcia, John LaFalce, Jim Moody, Claude Pepper, Robert Toricelli, and James Trafficant, Jr., all members of the Ninety-Ninth Congress. The plaintiff in Civil Action No. 85-4106 is the National Treasury Employees Union.

The United States was named as the defendant. Also intervening as defendants were Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives and the Bipartisan Leadership Group of the House, Jim Wright, Majority Leader; Robert Michel, Republican Leader; Thomas Foley, Majority Whip; and, Trent Lott, Republican Whip. The United States Senate and the Comptroller General also intervened as defendants.

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

Cases:

Constitution and Statutes:

Miscellaneous:

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1379

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, et al.,

Appellants,

v.

MIKE SYNAR, Member of Congress, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the United States District Court for the District of Columbia, dated February 7, 1986, is not yet reported. A copy of the opinion is included in an appendix being filed by the appellant in the related appeal of Charles G. Bowsher, Comptroller General of the United States v. Mike Synar, Member of Congress, et al.

JURISDICTION

The judgment of the three-judge panel of the District Court, declaring the automatic deficit reduction process established by the Balanced Budget and Deficit Control Act of 1985 to be unconstitutional and the presidential sequestration order of February 1, 1986, issued pursuant to that statute to be without

force and effect, was entered on February 7, 1986. That judgment constituted the final judgment in the two consolidated cases brought before the District Court pursuant to the specific jurisdictional grant provided by Section 274 of the Act. Appellants Speaker and Bipartisan Leadership Group of the House of Representatives filed their notice of appeal on February 10, 1986. This appeal is being docketed with this Court eight days later, well within the applicable time constraints. A copy of the notice of appeal is appended to this jurisdictional statement. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1252. As intervening defendants, the Speaker and Bipartisan Leadership Group were parties to the civil suit below, the final judgment entered by the District Court held an Act of Congress unconstitutional, and the United States was a defendant below.1/

This Court also has jurisdiction pursuant to section 274 of the Act which specifically provides that orders such as that entered by the District Court in this case shall be reviewable by appeal directly to the Supreme Court of the United States. App. 116a-117a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The District Court did not denominate a specific constitutional provision which it determined the challenged

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1/ The Department of Justice, although representing the United States in the District Court, declined to defend, and in fact joined in the attack on, the disputed provision of the statute. This Court has recently held that active participation by the House and Senate, in advocating an official defense of a statute in cases before this Court, is sufficient to supply the necessary adverseness to present an Article III "case or controversy." Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 931 n.6 (1983)(participation by the House and Senate in briefing and oral argument in case where the Department of Justice elected to challenge the constitutionality of a duly enacted statute).

statutory enactment offended. Rather, it relied on the doctrine of separation of powers as it perceived that doctrine to be explicated by the Framers of our Constitution and by this Court. The District Court did refer to the impeachment clauses as "[t]he only portions of the Constitution explicitly addressing the power to remove officers of the United States" App. 34a, and to the appointments clause, which it said, "is universally agreed [to] ha[ve] some bearing upon removal powers." App. 35a. Those Constitutional provisions provide as follows:

Article II, Section 4

"The President, Vice President, and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors."

Article I, Section 2, Clause 5

"The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment."

Article I, Section 3, Clause 6

"The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present."

Article II, Section 2, Clause 2

"He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

The Balanced Budget and Emergency Deficit Control Act, Pub. L. No. 99-177, is not yet available in either slip law or the Statutes-at-Large. The complete text of the statute is being furnished to the Court as part of the appendix filed in conjunction with the jurisdictional statements. App. 56a-119a. The key aspects of the Act, for the purposes of this appeal, are Sections 251 and 252. App. 81a-96a.

The statutory removal provision for the Comptroller General appears at 31 U.S.C. § 703(e). It provides:

"(e)(1) A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by --

(A) impeachment; or

(B) joint resolution of Congress, after notice, and an opportunity for a hearing, only for:

(i) permanent disability;

(ii) inefficiency;

(iii) neglect or duty;

(iv) malfeasance; or

(v) a felony or conduct involving moral turpitude."

STATEMENT

In response to growing concern over the federal deficit, the Congress and the President last year enacted an extraordinary piece of legislation. That legislation, the Balanced Budget and Emergency Deficit Control Act of 1985 ("the Act"), provides a complex mechanism by which automatic reductions in federal expenditures are triggered by the existence of a deficit which exceeds certain target figures. The deficit target figures are a regularly decreasing series of yearly deficit amounts which are not to be exceeded, and the goal is the elimination of the deficit by 1991.

The relevant portions of the Act provide that the Comptroller General is to receive reports compiled by the Directors of the Office of Management and Budget and the Congressional Budget Office which make and apply various economic assumptions in order to project a deficit figure for the particular fiscal year. The Directors are then required, in years when they project the deficit to exceed the target figure contained in the Act, to calculate a "saving" of the amount necessary to bring the deficit within the Act's acceptable limits, by applying a comprehensive mathematical formula to designate certain amounts to be "sequestered," or withheld, from expenditure within each federal budget account or activity. Each account or activity is to be affected in accordance with the formula contained within the Act which represents the legislative determination, forged by the Congress and the President, with regard to the availability of funds for sequestration.

The reports of the Directors are to be reviewed by the Comptroller General, an independent officer of the United States appointed by the President to a term of fifteen years with the advice and consent of the Senate. After reviewing the reports of

the Directors, and applying his own expertise, the Comptroller General is to issue his report to the President and the Congress. Like the report of the Directors the Comptroller General's report is to contain the determination of the amount of federal funds needed to be sequestered in order to reach the deficit target and an account-by-account listing of the amounts to be sequestered to obtain the total withholding necessary.

Upon receipt of the Comptroller General's report, the President is required by the Act to issue a presidential order requiring the implementation of the sequestration. The actual effect of the President's order is delayed for a specified period of time to allow for possible legislative action which would obviate the need for the sequestration.

The Plaintiffs, joined in this respect by the Department of Justice, challenged the constitutionality, on its face, of this aspect of the statute. Exercising litigative rights specifically provided for by the Act, the Congressional Plaintiffs and the Plaintiff National Treasury Employees Union each filed actions alleging that the statute was unconstitutional. Both suits claimed that the Act violated principles of separation of powers in improperly delegating legislative authority and in providing for the specific functions to be performed by the Comptroller General. The Department of Justice, while generally defending against the suits in the name of the United States, elected to join the plaintiffs in challenging the constitutionality of the Comptroller General's role.

As specifically provided for by the Act[2], and consistent with recently developed and judicially accepted practice, the appropriate legal representatives of the United States House of Representatives and the United States Senate intervened as defendants to offer an official defense of the Act's constitutionality. The Comptroller General also intervened as a defendant.

Section 274(a)(5) of the Act mandated that these challenges be heard by a three-judge panel and by order dated December 19, 1985, the Chief Judge of the District Court convened a three-judge court pursuant to the procedures outlined in 28 U.S.C. § 2284. The intervenor-defendants, the Senate, the Speaker and Bipartisan Leadership of the House, and the Comptroller General moved for dismissal. The plaintiffs moved for summary judgment. After

---

2/ The participation by the Speaker and the Bipartisan Leadership Group of the House is the regular mechanism for the House of Representatives to present it institutional interest in litigation. As the conference report on the Act explains, section 274(a)(4) also provides for intervention by the Senate and the House in such actions. It is intended that each body may employ what have developed to be the regular procedures to initiate participation in cases of institutional interest as they have in litigation concerning the 1984 Bankruptcy Act Amendments and the Competition in Contracting Act Amendments. See Increasing the Statutory Limit on the Public Debt, H. R. Rep. No. 433, 99th Cong. 1st Sess. 100 (1985). See also, In re Benny, 44 Bankr. 581 (N.D. Cal. 1984)(upholding the constitutionality of the 1984 Bankruptcy Act Amendments from a challenge joined in by the Department of Justice, Speaker and Bipartisan Leadership Group intervened to provide an official defense of the statute); appeal argued, No. 84-2805 (9th Cir. July 9, 1985); Ameron, Inc. v. U.S. Army Corps of Engineers, 607 F. Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985)(upholding the constitutionality of the Competition in Contracting Act in a challenge joined in by the Department of Justice, Speaker and Bipartisan Leadership Group intervened to provide an official defense of the statute), appeals argued, Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985).

The Speaker of the House has also represented the institutional interests of the body in various litigation in this Court. See, e.g., United States v. Helstoski, 442 U.S. 477 (1979) and Helstoski v. Meanor, 442 U.S. 500 (1979)(Briefed and argued by the Speaker as amicus); Hutchinson v. Proxmire, 443 U.S. 111 (1979)(Speaker and bipartisan leadership appeared as amici).

expedited briefing and argument the District Court entered the judgment appealed from herein.

The District Court found that both the Congressional and the union plaintiffs had standing to bring suit and that the powers in question could be lawfully delegated. The District Court also found that the "delegation to the Comptroller General violates the constitutionally requisite separation of powers." App. 3a. It is from this aspect of the district court's judgment that the Speaker and Bipartisan Leadership Group of the House appeal.

THE QUESTION IS SUBSTANTIAL

This Court should accept jurisdiction and afford plenary review for three sound reasons discussed below in detail. First, the legislation and its history state unmistakably that the Congress which adopted the Act and the President who signed it into law desired the prompt attention of this Court to questions raised as to the Act's constitutionality. While such a request may not be binding upon this Court in its determination of whether full plenary review should be granted, it is a factor that should receive the most careful consideration by the Court. Second, the emergency nature of this legislation and the budget crisis which gave rise to it are a sound reason for this Court to accept jurisdiction. Wisely, it has long been the practice of the Court to provide prompt constitutional review for legislative enactments attempting to deal with national concerns of great moment. Finally, the underlying constitutional question presented, involving the respective powers and obligations of the legislative and executive branches raises previously unresolved fundamental propositions relating to the structure of our national government. The attention, and determination, of this Court is particularly warranted in resolving disputes between the

political branches on such basic and important interpretations of the Constitution. Each reason standing alone whould warrant this Court to note its jurisdiction and to proceed with briefing, argument, and decision on the merits. Taken together these three considerations leave no room for doubt that this case is appropriate for full review by this Court.

The Congressional consideration of the Act was marked by concerns expressed by some Members as to the constitutionality of the evolving legislative proposal. The original Senate amendment ran a gauntlet of repeated consideration by each House, and an historic series of conference committee sessions which developed the eventual language that was signed into law. During this process, these constitutional concerns gave rise to a highly unusual and specific judicial review provision. This judicial review provision, Section 274 of the Act, App. 116a-118a, is the vehicle for the present challenges before the Court. Not only did it provide a specific mechanism for various plaintiffs, Congressional and others, to initiate suits but it also clearly evinces the intent of the Act for prompt Supreme Court review. Subsection (b) provides a specific, and expedited, procedure for bringing the case before this Court. To reemphasize its desire for Supreme Court review, the Congress included in the Act an automatic stay provision, adhered to by the District Court in this case, which mandated that any relief which was to be granted would not become effective until the appropriate opportunity for Supreme Court review had been afforded.

On rare occasions the Congress, normally motivated by unique concerns relating to constitutionality, will include in legislation specific provision for expedited judicial review with particular reference to Supreme Court consideration. It is entirely appropriate for the Court to recognize and accommodate

these requests, in a fashion consistent with the Court's obligations pursuant to Article III. To do so is an appropriate accommodation among the three branches working together in the interests of constitutional government. See Buckley v. Valeo, 424 U.S. 1 (1976).

This case is also appropriate for full plenary review in light of the extraordinary consequences of the lower court's action. The District Court recognized this in stating that "We do not minimize the effect of our invalidation of one small section of the Act upon the entire statutory scheme. Our holding today eliminates the automatic deficit reduction process...an important and hard-fought legislative program...." App. 49a. This Court has recognized that it is appropriate for it to adjudicate, with the legal and publicly perceived finality that only plenary review by the Supreme Court can provide, important constitutional disputes relating to the basic powers and duties of the coordinate branches. See United States v. Nixon, 418 U.S. 683 (1974). To leave the questions presented by this dispute unsettled could immobilize the constitutional process by which the political branches of the government are expected to set national policy. Such an outcome would be unseemly and can be avoided by this Court's determination of the issues presented by this appeal.

Finally, this appeal presents an important constitutional question which this Court has not previously resolved. While this Court has previously addressed the limited role of the Congress in the appointment of independent officers, Buckley v. Valeo, supra, it has not spoken with the same clarity regarding removal of independent officers by Act of Congress. The Court has recognized the President's inherent right to remove, without the restriction of obtaining the advice and consent of the

Senate, some officers that he is empowered to appoint. See Myers v. United States, 272 U.S. 52 (1926). A Congressional prerogative to establish, through the statutory process, limitations on the President's right to remove independent officers has also been recognized. Humphrey's Executor v. United States, 295 U.S. 602 (1935). Whether these decisions foreclosed a statutory removal provision of the nature contained in the 1921 Act establishing the modern Comptroller General, and the effect of these rulings on that pre-existing statute are questions of first impression to be resolved in this case.

Furthermore, while this Court has in recent years eloquently spoken to the need for unswerving adherence to the "explicit constitutional standards . . . [and] carefully crafted restraints spelled out in the Constitution," INS v. Chadha, 462 U.S. 919, 959 (1983), and how congressional authority with respect to independent officers "is inevitably bounded by the express language of Art. II, § 2, cl. 2 ..." Buckley v. Valeo, supra, at 139, the Court has not specified whether aspects of separation of powers which are found not in the text of the Constitution but rather in its interpretive application are to be applied with the same mechanistic rigidity. That fundamental question is deserving of Supreme Court attention.

CONCLUSION

For the reasons presented above probable jurisdiction should be noted and the Court should set the matter for plenary consideration.

Respectfully submitted,

Steven R. Ross*
General Counsel to the Clerk

Charles Tiefer
Deputy General Counsel to the Clerk

Michael L. Murray
Assistant Counsel to the Clerk

Janina Jaruzelski
Assistant Counsel to the Clerk

U.S. House of Representatives
The Capitol, H-105
Washington, D.C. 20515
(202) 225-9700

* Counsel of Record

February 18, 1986

APPENDIX

FOR THE DISTRICT OF COLUMBIA

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NATIONAL TREASURY EMPLOYEES UNION, Plaintiff, v. UNITED STATES OF AMERICA, *et al.* Defendant.	Civil Action No. 85-4106 Judge Antonin Scalia Judge Oliver Gasch Judge Norma Holloway Johnson
REPRESENTATIVE MIKE SYNAR, *et al.* Plaintiffs, v. UNITED STATES OF AMERICA, *et al.* Defendant.	Civil Action No. 85-3945

NOTICE OF APPEAL TO THE SUPREME COURT

Notice is hereby given that intervening-defendants Speaker and Bipartisan Leadership Group of the United States House of Representatives appeal to the Supreme Court from the order entered in these actions on February 7, 1986, declaraing that the Balanced Budget and Emergency Deficit Control Act of 1985, Publ. L. No. 99-177, 99 Stat. 1037, is unconstitutional, and that the presidential sequestration order issued on Feburary 1, 1986 pursuant to that statute is without legal force and effect.

Respectfully submitted,

Steven R. Ross
General Counsel to the Clerk

Charles Tiefer
Deputy General Counsel to the Clerk

Michael L. Murray
Assistant Counsel to the Clerk

Janina A. Jaruzelski
Assistant Counsel to the Clerk

U.S. House of Representatives
The Capitol, H-105
Washington, D.C. 20515
(202) 225-9700

Attorneys for Intervenors Speaker and Bipartisan Leadership Group

February 10, 1986

EDITOR'S NOTE

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85-1378
No. 85-1379

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1985

Charles A. Bowsher, Comptroller
General of the United States,
Appellant,

v.

Mike Synar, Member of Congress, et al.,
Appellees.

On Appeal from the United States
District Court for the District of Columbia

APPENDICES TO JURISDICTIONAL STATEMENT

Harry R. Van Cleve
General Counsel

James F. Hinchman
Deputy General Counsel

Robert P. Murphy
Attorney-Adviser
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548
Tel. (202) 275-5207

Lloyd N. Cutler*/
John H. Pickering
William T. Lake
Daniel M. Drory
Richard K. Lahne
Neal T. Kilminster

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for the Comptroller
General of the United States

*/ Counsel of Record

February 18, 1986

APPENDICES

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, Intervenors.	Civil Action No. 85-3945

FILED
FEB 7 1986
JAMES E. DAVEY, Clerk

NATIONAL TREASURY EMPLOYEES UNION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant, UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, Intervenors.	Civil Action No. 85-4106

Alan B. Morrison, with whom Katherine A. Meyer was on the brief, for plaintiffs in No. 85-3945.

Lois G. Williams, with whom Gregory O'Duden and Richard S. Edelman were on

the brief, for plaintiff in No. 85-4106.

Richard K. Willard, Assistant Attorney General, with whom Joseph E. diGenova, United States Attorney, David J. Anderson, Branch Director, United States Department of Justice, Neil H. Koslowe, Special Litigation Counsel, United States Department of Justice, and Douglas Letter, Harold J. Krent, Robert E. Kopp, Leonard Schaitman, Judith Ledbetter, Lee Sarah Liberman, Lori Fields and Richard Greenberg, Attorneys, United States Department of Justice, were on the brief, for defendant United States of America.

Michael Davidson, Counsel, United States Senate, with whom Ken U. Benjamin, Deputy Counsel, United States Senate, and Morgan J. Frankel and John C. Grabow, Assistant Counsel, United States Senate, were on the brief, for intervenor-defendant United States Senate.

Steven R. Ross, General Counsel to the Clerk of the United States House of Representatives, with whom Charles Tiefer, Deputy General Counsel to the Clerk of the United States House of Representatives, and Michael L. Murray, Assistant Counsel to the Clerk of the United States House of Representatives, were on the brief, for intervenor-defendant Speaker and Bipartisan Leadership Group of the United States House of Representatives.

Lloyd N. Cutler, with whom Harry R. Van Cleve, General Counsel, United States General Accounting Office, James F. Hinchman, Deputy General Counsel, United States General Accounting Office, Robert P. Murphy, Attorney-Advisor, United States General Accounting Office, John H. Pickering, William T. Lake, Michael S. Helfer, Daniel M. Drory and Richard K. Lahne were on the brief, for intervenor-defendant Comptroller General of the United States.

Before SCALIA, Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit, JOHNSON, District Judge of the United States District Court for the District of Columbia, and GASCH, Senior District Judge of the United States District Court for the District of Columbia.

PER CURIAM:

Plaintiffs in these consolidated cases challenge the constitutionality of certain features of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, popularly known as the Gramm-Rudman-Hollings Act, signed into law by President Reagan on December 12, 1985. The principal issues presented are whether the plaintiffs, Members of Congress and the National Treasury Employees Union, have standing to litigate the points they raise; whether the Act unconstitutionally delegates legislative powers that may be exercised only by Congress; and, if not, whether it confers upon the Comptroller General executive powers that may not constitutionally be given to an officer removable by Congress. We find that plaintiffs in both cases have standing, and that the powers in question may lawfully be delegated, but that the delegation to the Comptroller General violates the constitutionally requisite separation of powers.

I

In the Act, Congress has set a "maximum deficit amount" for each of the fiscal years 1986 through 1991, its size progressively reducing to zero in fiscal year 1991. Section 251 provides that each year the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") shall estimate the amount of the deficit for the upcoming fiscal year, and, if it exceeds the maximum deficit amount for that fiscal year by more than a specified amount, shall calculate, program by program pursuant to rules specified in the Act, the budget reductions necessary to ensure

that the deficit does not exceed the maximum deficit amount for that year. The Directors must jointly report their deficit estimates and budget reduction calculations to the Comptroller General. After reviewing the Directors' report, the Comptroller General must issue his own report, containing his deficit estimates and budget reduction calculations, to the President and Congress. Section 252 of the Act requires the President to issue a "sequestration" order containing the budget reductions specified by the Comptroller General. After a prescribed time, the sequestration order becomes effective and the spending reductions included in that order are automatically made. The automatic deficit reduction process for fiscal year 1986 has progressed to the point of issuance, on February 1, 1986, of the presidential sequestration order, which will take effect on March 1, 1986. See Order, Emergency Deficit Control Measures for Fiscal Year 1986 (Feb. 1, 1986).

The Act also provides what might be called a "fallback" deficit reduction process, to take effect if any of the reporting procedures of the above-described "automatic" deficit reduction process are found unconstitutional. Under the fallback process, the report prepared by the Directors of the OMB and the CBO is submitted, instead of to the Comptroller General, to a special joint committee of Congress, which must in five days report to both Houses a joint resolution setting forth the contents of the Directors' report. The joint resolution is then considered under special rules, and, if passed and signed by the President, serves as the basis for the presidential sequestration order under section 252.

Civil Action No. 85-3945, seeking declaratory relief against the United States, was commenced on December 12, 1985 by Mike Synar, a Member of the House of Representatives who voted against the Act. An amended complaint, filed on December 19, 1985, added as plaintiffs eleven other Representatives who voted against the Act. Jurisdiction is averred to exist pursuant to subsection 274(a)(1) of the Act, which authorizes any Member of Congress to bring an action in this court "for declaratory and

injunctive relief on the ground that any [presidential] order that might be issued pursuant to section 252 violates the Constitution."[1]

The complaint alleges that the automatic deficit reduction process, under which the President is required by section 252 to issue a sequestration order implementing the report issued by the Comptroller General pursuant to section 251, is unconstitutional in two respects. Plaintiffs' first contention, briefly and essentially, is that the delegation of power by Congress to the President and other government officials is an unconstitutional delegation of legislative power. Their second contention is that the powers assigned to the Comptroller General and the Director of the CBO, both deemed legislative branch officials by plaintiffs, constitutionally must be assigned to executive branch officials. The Representatives allege that these unconstitutional provisions injure them by (1) interfering with their constitutional duties to enact laws regarding federal spending; (2) causing automatic reductions in their salaries, staff salaries, and office expenses; and (3) causing automatic reductions in a variety of programs benefiting their constituents. They seek a judgment declaring that the automatic deficit reduction process is unconstitutional and that the President is without power, therefore, to order spending reductions pursuant to that process.

In response to the Synar complaint, the United States filed a motion to dismiss on the ground that the congressional plaintiffs lack standing to bring the action. The United States Senate and the Comptroller General moved for leave to intervene as defendants and also filed motions to dismiss on the ground that the Act is constitutional. The unopposed motions to intervene were granted on December 31, 1985.

Civil Action No. 85-4106, challenging the constitutionality of the automatic deficit reduction process on legal theories identical to those presented in the Synar

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[1] Subsection 274(a)(5) provides that any such action "shall be heard and determined by a three-judge court in accordance with [28 U.S.C. § 2284]." A designation of judges to serve as the three-judge district court in this case was made by the Chief Judge for the District of Columbia Circuit on December 16, 1985.

action, was filed on December 31, 1985 by the National Treasury Employees Union ("NTEU"). NTEU, an unincorporated association representing the interests of both active and retired federal employees, alleges that its retired members have been injured as a result of the Act's automatic spending reduction provisions, which have operated to suspend cost-of-living adjustments ("COLAs") otherwise due federal retirees on January 1, 1986 and which will operate to cancel those COLAs and other COLAs due in the future. NTEU invokes the court's jurisdiction pursuant to 28 U.S.C. § 1331 and to subsection 274(a)(2) of the Act, which provides, in pertinent part, that "any other person adversely affected by an action taken under this title, may bring an action [in this court] for declaratory judgment and injunctive relief concerning the constitutionality of this title." By Order dated January 2, 1986, the NTEU suit was consolidated with the earlier action.

Subsequent to consolidation, the congressional plaintiffs and NTEU filed their respective motions for summary judgment on January 6, 1986. The congressional plaintiffs also filed an opposition to the motion of the United States to dismiss their complaint for lack of standing. Thereafter, on January 8, 1986, the Speaker and Bipartisan Leadership Group of the United States House of Representatives, granted leave to intervene as a defendant in the consolidated cases, filed a memorandum of law in support of the constitutionality of the Act.

The United States filed a cross-motion for summary judgment, again contending that the complaint of the congressional plaintiffs must be dismissed for lack of standing but conceding that NTEU appears to have standing. On the merits, the position of the United States is that the Act does not unconstitutionally delegate legislative authority but that the role of the Comptroller General in the automatic deficit reduction process violates the principle of separation of powers.[2]

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[2] The United States has also requested us to declare that the fallback deficit reduction process contained in § 274 of the Act is constitutional. Although we see no reason to (cont'd)

The motions of plaintiffs for summary judgment, as well as the cross-motion of the United States for summary judgment on the merits, are opposed by the Senate, the Comptroller General, and the Speaker and Bipartisan Leadership Group of the United States House of Representatives. Argument on these dispositive motions was heard on January 10, 1986, and the cases taken under advisement. By Order dated January 23, 1986, the Senate and the Comptroller General were granted leave to intervene in the NTEU action.

II

In view of the established rule that "consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another," Johnson v. Manhattan Railway, 289 U.S. 479, 496-97 (1933); see also McKenzie v. United States, 678 F.2d 571, 574 (5th Cir. 1982), we find it necessary to make separate standing determinations with respect to the plaintiffs in each case under consideration. Moreover, even though the standing of NTEU has not been directly challenged, we must satisfy ourselves that NTEU has standing before we can proceed to consider its claims. Article III circumscribes the power of federal courts, and "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 475-76 (1982). Before turning to a particularized analysis of whether NTEU and the congressional plaintiffs have made the necessary showing for standing in their respective cases, a brief general discussion of the applicable principles is appropriate.

While the plaintiffs invoke this court's jurisdiction under the judicial review provisions contained in section 274 of the Act, they concede, as they must, that Congress

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doubt that proposition, the issue simply is not before this court. The plaintiffs have conceded the constitutionality of the fallback process, and the United States — the nominal defendant — has not set forth any claim for relief in its own behalf.

may not abrogate the constitutional limitations imposed by Article III upon the power of the federal courts. See Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979); Muskrat v. United States, 219 U.S. 346 (1911). Article III limits the jurisdiction of federal courts to "cases or controversies," and "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III .... is the threshold question in every federal case." Warth v. Seldin, 422 U.S. 490, 498 (1975). Principles of standing ensure that one who invokes the power of a federal court satisfies this "case or controversy" requirement.

Although the Supreme Court has noted that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," Valley Forge Christian College, 454 U.S. at 475, the Court has repeatedly recognized that the concept entails certain basic requirements. The first and most fundamental of these is that a party must allege a "distinct and palpable injury to himself." Warth v. Seldin, 422 U.S. at 501. This injury must be a "particular concrete injury," United States v. Richardson, 418 U.S. 166, 177 (1974), which must amount to "a claim of specific present objective harm or a threat of specific future harm." Laird v. Tatum, 408 U.S. 1, 14 (1972). A plaintiff need not await the consummation of a threatened injury in order to have standing; it is sufficient that the injury is imminent. Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979). The further requirements of Article III standing are set forth in the Supreme Court's recent formulation that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to [show] . . . that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.' " Valley Forge Christian College, 454 U.S. at 472 (quoting Simon v. Eastern Kentucky Welfare Rights Organization, 426 U.S. 26, 38, 41 (1976)); see also Allen v. Wright, 104 S. Ct. 3315 (1984).

Thus, at a minimum, Article III requires NTEU and the congressional plaintiffs to show (1) actual or threatened injury, (2) traceable to the defendant and (3) amenable to

judicial remedy.[3] In analyzing whether they have done so, we must accept as true all material allegations of the complaints and construe them in favor of the complaining parties. Warth v. Seldin, 422 U.S. at 501. We therefore assume, for the limited purpose of the following standing analysis, that the automatic deficit reduction process challenged by plaintiffs is unconstitutional.

A

NTEU contends that it has standing to bring this action because subsection 252(a)(6)(C)(i) of the Act, as part of the automatic deficit reduction process, has operated to suspend payment of annual COLA benefits otherwise due those of its members who are federal retirees. NTEU also complains that, effective March 1, 1986, the presidential sequestration order issued on February 1, 1986 will permanently cancel retirees' COLA benefits for this fiscal year.[4] It claims that these actual and threatened injuries have been and will be caused by the automatic deficit reduction process and would be redressed if that process were declared unconstitutional.

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3 In the ordinary case, other limitations on standing exist — so-called "prudential" limitations, not strictly required by Article III. One of these that might normally have some effect in the present case is the requirement that the plaintiff be arguably within the "zone of interests" intended to be protected by the statutory or constitutional provision on which he relies. See, e.g., Valley Forge Christian College, 454 U.S. at 475. We disregard these prudential limitations because we think it clear that Congress has, by enacting the judicial review provisions contained in § 274, expanded standing to challenge the constitutionality of the Act to the full extent permitted by Article III. Cf. Gladstone, Realtors v. Village of Bellwood, 441 U.S. at 100.

4 Subsection 252(a)(6)(C)(i) provides, in pertinent part:

> Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be . . . paid [between the enactment of the Act and the effective date of a sequestration order for fiscal year 1986] shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during [fiscal year 1986], the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled.

. It is well established that an association such as NTEU has standing to sue solely as the representative of its members, provided that they individually would have standing. Warth v. Seldin, 422 U.S. at 511. There is no question that NTEU's federal retiree members have suffered actual injury by the suspension of their COLA benefits pursuant to the Act, and that they will suffer further injury by the permanent cancellation of those benefits on March 1, 1986, under the terms of the President's February 1 sequestration order. See Order, Emergency Deficit Control Measures for Fiscal Year 1986 1, 4 (Feb. 1, 1986). We conclude that NTEU has made a sufficient showing of injury to satisfy Article III's threshold requirement of injury-in-fact.

We must also consider the question of redressability, i.e., whether it is likely that the relief requested will redress the injury complained of, before a finding of standing can be made. As to at least the second of the injuries of which NTEU complains — the imminent permanent cancellation of its members' COLA benefits by the operation of the presidential sequestration order — it is unquestionable that a judicial remedy exists. If we declare the automatic deficit reduction process invalid, no cancellation of the COLA benefits will occur as a result of that process.[5] Rather, the fallback deficit reduction process established by subsection 274(f) will come into play,[6] and any cancellation of COLAs under that process will require the passage of legislation. The mere possibility that subsequent legislation might produce the same harm for which a judicial remedy is sought is not sufficient to eliminate redressability and hence standing. Cf. Orr v. Orr, 440 U.S. 268, 272 (1979).

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[5] Although the provision for COLA suspensions would survive invalidation of the portions of the Act under challenge here, it cannot be argued that indefinite suspension (i.e., suspension unless and until a joint resolution is enacted) would render our invalidation of automatic cancellation illusory. It is clear from the language and structure of § 252(a)(6)(C)(i)-(ii) that any COLA suspension would extend no longer than one fiscal year.

[6] In light of the existence of the fallback process and the fact that the remainder of the Act, as supplemented by that process, functions as a coherent piece of legislation, there is no doubt that the automatic deficit reduction process is severable from the remainder of the Act.

Because the threatened injury of permanent cancellation of the COLA benefits pursuant to an unconstitutional process may be redressed, we conclude that NTEU has standing to bring its action.

B

Of the three types of injury that the congressional plaintiffs rely upon for standing, briefly outlined above, we need consider only their claim that the automatic deficit reduction process interferes with their constitutional duties to enact laws regarding federal spending and infringes upon their lawmaking powers under the Constitution, in that spending reductions made pursuant to the challenged process will, in effect, override earlier, duly enacted appropriations laws in a manner other than that prescribed by Article I, section 7. In response, the United States contends that this injury is nothing more than a generalized grievance shared by all other citizens and thus insufficient to support standing.

Under the law of this Circuit, which recognizes a personal interest by Members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief,[7] we conclude that standing exists. Although it is somewhat difficult to reconcile the various cases on congressional standing in this Circuit, and in particular to tell which denials of relief in earlier cases, seemingly for lack of standing, are now to be explained, in light of later cases, as resting upon an exercise of equitable discretion, the cases clearly recognize that specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him. See, e.g., Moore v. United States House of Representatives, 733 F.2d

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[7] Two judges of the Court of Appeals, including a member of the present panel, have expressed disagreement with this analysis, see Barnes v. Kline, 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), petition for cert. filed, 54 U.S.L.W. 3346 (U.S. Nov. 5, 1985) (No. 85-781); Moore v. United States House of Representatives, 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring), cert. denied, 105 S. Ct. 779 (1985). It has, however, been adopted by several panels of the Court of Appeals and is the law of this Circuit.

946, 952 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 779 (1985); Vander Jagt v. O'Neill, 699 F.2d 1166 (D.C. Cir.), cert. denied, 464 U.S. 823 (1983); Riegle v. Federal Open Market Committee, 656 F.2d 873 (D.C. Cir.), cert. denied, 454 U.S. 1082 (1981). More specifically, our Court of Appeals has held that "unconstitutional deprivations of a legislator's constitutional duties or rights . . . may give rise to standing if the injuries are specific and discernible." Moore v. United States House of Representatives, 733 F.2d at 952 (citing Kennedy v. Sampson, 511 F.2d 430 (D.C. Cir. 1974); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); and American Federation of Government Employees v. Pierce, 697 F.2d 303 (D.C. Cir. 1982) (per curiam)). Put another way, a Member of Congress may have standing where he alleges a " 'specific and cognizable' [injury] arising out of an interest 'positively identified by the Constitution.' " United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d 1375, 1381 (D.C. Cir. 1984) (quoting Moore v. United States House of Representatives, 733 F.2d at 951).

Applying these standards to the instant case, we conclude that plaintiffs have alleged specific and cognizable injury sufficient to establish standing in their official capacities. The congressional plaintiffs claim that they are and will continue to be injured by the operation of the automatic deficit reduction process because it interferes with their "constitutional duties to enact laws regarding federal spending" and infringes upon their lawmaking powers under Article I, section 7. Accepting as true plaintiffs' allegations, as we must for purposes of determining their standing, the Act unconstitutionally gives to the Comptroller General and the President formal power to amend or repeal appropriations legislation that was lawfully passed, and thus effectively to nullify plaintiffs' votes on that earlier legislation. This claim of injury is "specific" and "discernible"; and it arises out of an interest "identified by the Constitution," that is, a congressional interest in having all laws made in the manner prescribed under the general lawmaking provision contained in Article I, section 7. This interest differs significantly from the more abstract and generalized interest unsuccessfully asserted by

lawmakers in United Presbyterian Church in the U.S.A. v. Reagan, 738 F.2d at 1375, and Harrington v. Bush, 553 F.2d at 190, viz., the interest in preventing unlawful executive enforcement of a statute from "diminishing the effectiveness" of, or "nullifying," past votes on that statute. Permitting lawmakers to assert the latter interest would be tantamount to giving them standing to challenge the lawfulness of all executive action taken under a statute; entertaining the present suit would not.

Finally, we find no occasion to consider exercising the equitable discretion held by this Circuit's cases to justify denial of specific or declaratory relief to Members of Congress. Section 274 of the Act specifically provides for such relief to such plaintiffs, thus eliminating whatever equitable discretion might exist and leaving only the limitations of Article III.

III

Plaintiffs contend that the Act's delegation to administrative officials of the power to make the economic calculations that determine the estimated federal deficit and hence the required budget cuts violates the constitutional provision vesting "all legislative power" in the Congress. See Art. I, § 1. It is strictly unnecessary for us to reach this point, since we hold in Part IV of this opinion that the challenged provisions of the Act are unconstitutional on other grounds. We think it appropriate, however, in light of the injunction of subsection 274(c) of the Act that we "expedite to the greatest possible extent the disposition" of these cases, and in light of the direct appeal to the Supreme Court provided by subsection 274(b), that we depart from normal prudential practice and provide our views obiter dicta. We thereby avoid the necessity that the Supreme Court, if in its judgment the point must be reached, must either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose.

A

The delegation doctrine is rooted in the principle of separation of powers that underlies the three-branch system of government established by the Constitution. As the Supreme Court stated in Field v. Clark, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In the first century and a half of the nation's history, however, the Court uniformly held that challenged statutes did not unconstitutionally delegate legislative power. See, e.g., Federal Radio Commission v. Nelson Brothers Bond & Mortgage, 289 U.S. 266 (1933); J. W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928); United States v. Grimaud, 220 U.S. 506 (1911). As Chief Justice Taft explained in a passage that has become the classic exposition of the governing test, the separation-of-powers principle does not prevent the legislative branch from seeking the "assistance" of coordinate branches; "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination"; and so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." J. W. Hampton, 276 U.S. at 406, 409.

In 1935, however, the Court used the delegation doctrine to strike down portions of the National Industrial Recovery Act of 1933. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Panama Refining Co. v. Ryan, 293 U.S. 388 (1935). In these cases, the Court concluded that Congress had failed to articulate a policy or set of standards which would serve to confine the discretion of the individuals exercising the delegated authority. See Schechter, 295 U.S. at 541-42; Panama Refining, 293 U.S. at 430. These two cases are the only cases in which the Court has declared a statute

unconstitutional by reason of undue delegation.[8]

In the fifty years since Schechter was decided, the Court has consistently rejected delegation challenges.[9] Nominally, it has continued to apply the same test (as Schechter and Panama Refining themselves nominally applied the same test as J. W. Hampton), scrutinizing the challenged statutes for intelligible standards and statements of purpose which could provide guidance to the officials to whom authority was delegated. See, e.g., Yakus v. United States, 321 U.S. 414, 424-25 (1944); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165-66 (1941); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941); United States v. Rock Royal Co-operative, 307 U.S. 533, 574 (1939). Pragmatically, however, the Court's decisions display a much greater deference to Congress' power to delegate, motivated in part by concerns that, "[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy." Opp Cotton Mills, 312 U.S. at 145. In Yakus, 321 U.S. at 425-26, the Court noted:

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8 The delegation doctrine was also discussed by the Court in Carter v. Carter Coal Co., 298 U.S. 238 (1936). There the Court ruled that a provision in the Bituminous Coal Conservation Act of 1935 which authorized various majorities of coal producers and mine workers to set maximum hours and minimum wages for all miners was unconstitutional. Id. at 311. The Court denounced that provision as "legislative delegation in its most obnoxious form," but the Court's holding appears to rest primarily upon denial of substantive due process rights. Id.

9 See, e.g., United States v. Mazurie, 419 U.S. 544, 556-57 (1975); United States v. Sharpnack, 355 U.S. 286, 297 (1958); District of Columbia v. John R. Thompson Co., 346 U.S. 100, 110 (1953); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950); Lichter v. United States, 334 U.S. 742, 774-75 (1948); Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144-45 (1948); Fahey v. Mallonee, 332 U.S. 245, 250 (1947); American Power & Light Co. v. SEC, 329 U.S. 90, 104-05 (1946); Bowles v. Willingham, 321 U.S. 503, 516 (1944); Yakus v. United States, 321 U.S. 414, 426 (1944); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943); Pittsburgh Plate Glass Co. v. NLRB, 313 U.S. 146, 165 (1941); Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 146 (1941); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 397 (1940); United States v. Rock Royal Co-op., 307 U.S. 533, 574 (1939); Mulford v. Smith, 307 U.S. 38, 48-49 (1939); Currin v. Wallace, 306 U.S. 1, 15 (1939).

> It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .
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> . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose . . . .

The Supreme Court has endeavored to narrow the application of Schechter and Panama Refining by noting that those cases involved "delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom," Fahey v. Mallonee, 332 U.S. 245, 249 (1947), and that Schechter concerned a statute which delegated regulatory power to private individuals, see Yakus, 321 U.S. at 424. These attempts at narrowing the cases, and the Supreme Court's failure to use the delegation doctrine to strike down a statute in fifty years, have led some to conclude that the delegation doctrine is dead, or at least "moribund." See National Cable Television Association v. United States, 415 U.S. 336, 353 (1974) (Marshall, J., dissenting). The Court has continued to use the doctrine, however, in an interpretive mode, finding that statutory texts conferring powers on the Executive should be construed narrowly where broader construction might represent an unconstitutional delegation. See, e.g., Industrial Union Department v. American Petroleum Institute, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.); National Cable Television Association, 415 U.S. at 342; Zemel v. Rusk, 381 U.S. 1, 17-18 (1965); Kent v. Dulles, 357 U.S. 116, 129 (1958). Such cases indicate that while the delegation doctrine may be moribund, it has not yet been officially interred by the Court.

Our analysis of the delegation challenged in the instant cases thus proceeds on the assumption that the delegation doctrine remains valid law, but that its scope must be determined on the basis of the deferential post-Schechter cases decided by the Supreme

Court. We note, moreover, that the mode of analysis applied by the Supreme Court in this field relies substantially upon factual comparison of the delegation under challenge with delegations previously adjudicated. See, e.g., Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144-46 (1948); American Power & Light Co. v. SEC, 329 U.S. 90, 104-05 (1946); Opp Cotton Mills, 312 U.S. at 146; Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 398 (1940). With that teaching firmly in mind, we turn to the arguments raised by plaintiffs.

B

Plaintiffs advance a number of arguments that attempt to establish what might be termed per se nondelegability of the powers at issue here — as opposed to arguments, which we will discuss in the following section, going to deficiency in the standards governing the delegation. Plaintiffs begin by arguing that the type of authority delegated by the Act is "so central to the legislative function" that it may not be delegated. They cite the dictum of Chief Justice Marshall in support of the notion that there exist certain nondelegable "core functions" of Congress:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.

Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). The legislative power over appropriations conferred by Article I, section 8, clause 1 and Article I, section 9, clause 7 is said to constitute such a nondelegable "core function," particularly where the delegated authority could affect the functioning of a broad range of federal programs and, plaintiffs allege, would allow "unelected bureaucrats" to "override" portions of duly enacted appropriations laws.

We reject this "core functions" argument for several reasons. First, plaintiffs cite no case in which the Supreme Court has held any legislative power, much less that over

appropriations, to be nondelegable due to its "core function" status. Indeed, in Lichter v. United States, 334 U.S. 742, 778-79 (1948), the Court stated flatly that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Second, judicial adoption of a "core functions" analysis would be effectively standardless. No constitutional provision distinguishes between "core" and "non-core" legislative functions, so that the line would necessarily have to be drawn on the basis of the court's own perceptions of the relative importance of various legislative functions. Finally, if there were any nondelegable "core functions," there is no reason to believe that appropriations functions would be among them. The appropriations power is not functionally distinguishable from other powers successfully delegated by Congress,[10] and is particularly akin to the taxing power, which is similarly derived from Article I, section 8, clause 1 of the Constitution. In upholding a statute which delegated the latter power by permitting the President to determine whether to increase duties on certain articles in foreign commerce, the Supreme Court said:

> It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

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[10] The Supreme Court has, of course, frequently upheld delegation of regulatory authority under the commerce clause power. Delegations of authority conferred by many other constitutional provisions also have been sustained, however. It has been held, for example, that Congress properly delegated power over immigration, see INS v. Chadha, 462 U.S. 919, 953-54 n.16 (1983); United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542-44 (1950); the power to determine what constitutes a federal crime, see United States v. Sharpnack, 355 U.S. 286 (1958); United States v. Grimaud, 220 U.S. 506 (1911); and the power to legislate for the District of Columbia, even though the Constitution describes that power as "exclusive" in Congress. See District of Columbia v. John R. Thompson Co., 346 U.S. 100 (1953). Moreover, in Lichter, 334 U.S. at 778-79, the Court stated that Congress' power to delegate "is especially significant in connection with constitutional war powers."

J. W. Hampton, 276 U.S. at 409; see also Field v. Clark, 143 U.S. at 680-94.

The second contention that may be viewed as going to per se nondelegability of the authority conferred by the Act (though it is related to the issue of inadequate standards) concerns the breadth of the power allocated to administrative officials, which plaintiffs assert is constitutionally excessive. There is no doubt that the Act delegates broad authority, but delegation of similarly broad authority has been upheld in past cases. In Yakus, for example, the Court upheld a statute which delegated to an unelected Price Administrator the power "to promulgate regulations fixing prices of commodities." 321 U.S. at 420. In Bowles v. Willingham, 321 U.S. 503, 512, 514-15 (1944), it upheld the delegation of power to institute rent controls on real property anywhere in the nation under specified circumstances. Finally, in Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737, 745, 763 (D.D.C. 1971), a three-judge district court upheld a delegation of authority to the President "to issue such orders and regulations as he deems appropriate to stabilize prices, rents, wages and salaries." The authority conferred by the present Act, which permits administrators to affect spending levels for a specified range of federal programs, and only to a certain degree, seems to us no broader than these delegations that have been upheld. We think, in any event, that the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope plus the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in Schechter) the standards must be correspondingly more precise. As we shall see, the standards governing the power here are much more specific than in the cases just described.

Nor is it the law, as plaintiffs assert, that a broad delegation such as this must be supported by some rigorous "principle of necessity" which is allegedly not met here because Congress has exercised sole power over appropriations in the past and presumably could continue to do so. To be sure, in delegation cases the Supreme Court

has occasionally recognized the "necessity" for a delegation. See, e.g., Buttfield v. Stranahan, 192 U.S. 470, 496 (1904). It is doubtful, however, that the word "necessity" in that context, any more than the word "necessary" in the "necessary and proper" clause of the Constitution, refers to an "absolute physical necessity." See McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 413-15 (1819). Rather, necessity refers to a strong utility and convenience, which can certainly be considered to exist here. In any case, while "necessity" has been noted by the Court in upholding a delegation, "lack of necessity" has never been invoked to strike one down. The same response may be made to plaintiffs' argument based upon what they consider the long (six-year) duration of the present broad delegation: while extremely limited duration has been invoked as one of the elements sustaining a delegation, lengthy duration has never been held to render one void. The delegations upheld in J.W. Hampton, 276 U.S. at 394, and Field v. Clark, 143 U.S. at 649, for example, were for indefinite terms.

Finally, plaintiffs argue that the present delegation is per se invalid because it allows administrators to "nullify" or "override" laws. Again we disagree. The Supreme Court previously has upheld delegations which permit officials to determine when, if ever, a law should take effect. See, e.g., Rock Royal Co-operative, 307 U.S. at 577-78; Currin v. Wallace, 306 U.S. 1, 15-16 (1939); Field v. Clark, 143 U.S. at 693; The Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 388 (1812). In such cases, the Court classifies Congress' action as legislating in contingency. The instant Act is no more than a form of such contingent legislation. Throughout the Act, Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required target figures. Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.

C

We come, then, to what is the plaintiffs' principal argument on the excessive delegation point: that because of the lack of standards and the inherent imprecision of the duties conferred upon the administrators, the Act fails adequately to confine the exercise of administrative discretion. The search for adequate standards to restrict administrative discretion lies at the heart of every delegation challenge. The essential inquiry is whether the specified guidance "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." Yakus, 321 U.S. at 425.

Our consideration of this objection requires a careful review of the statute. The Act begins by establishing a "maximum deficit amount" for each fiscal year between 1986 and 1991. Act § 201(a)(1). It then requires the Directors of the OMB and the CBO to estimate the anticipated "budget base levels of total revenues and budget outlays" for a given fiscal year, to determine whether the projected deficit for that year will exceed the maximum deficit amount for that year by more than a specified amount, and to estimate the rate of real economic growth that will occur during that fiscal year, as a whole and by quarters, and the rate of real economic growth that occurred during each of the last two quarters of the preceding fiscal year. Id. § 251(a)(1). The Directors are then jointly to report their conclusions to the Comptroller General. Id. § 251(a)(2).[11]

The Comptroller General is instructed to "review and consider the report" and, "with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein," issue his own report making the same type of estimates and determinations contained in the Directors' report. Act § 251(b)(1)-(2). The

[11] These conclusions all contribute to the calculation of whether the estimated deficit for a given fiscal year exceeds the maximum deficit amount by more than the amount specified in § 251(a)(1)(B) of the Act. Only if it does so will the Directors recommend spending reductions. See Act § 251(a)(2). Plaintiffs do not challenge the procedure by which the administrators are to allocate the spending reductions necessary to reduce the deficit excess.

Comptroller General's report is to "be based on the estimates, determinations, and specifications of the Directors and shall utilize the budget base, criteria, and guidelines set forth" in specified sections of the Act. Id. § 251(b)(1). The report must "fully explain" any differences between its determinations and those included in the report of the Directors. Id. § 251(b)(2).[12]

In considering whether this scheme contains constitutionally adequate legislated standards, we first observe that it does set forth specific assumptions that are to be used in calculating the budget base. See Act § 251(a)(6). The administrative officials are directed to assume, with some specified exceptions, "the continuation of current law in the case of revenues and spending authority," id. § 251(a)(6)(A), (C)[13] and, in all areas to which the preceding assumption is inapplicable, "appropriations equal to the prior year's appropriations except to the extent that annual appropriations or continuing appropriations for the entire fiscal year have been enacted." Id. § 251(a)(6)(B). They must assume that "expiring provisions of law providing revenues and spending authority . . . do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates." Id. § 251(a)(6)(C). Additionally, they must assume that "Federal pay adjustments for statutory pay systems" will be as recommended by the President and will not result in pay reductions and that Medicare spending levels for inpatient hospital

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12 In fiscal years 1987-1991, the Directors and the Comptroller General are required to submit revised reports under § 251(c) of the Act. We disregard that refinement for present purposes, since the types of determinations to be made in those revised reports do not differ from those required to be made in the initial reports.

13 "Spending authority" is defined by reference to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in relevant part as amended at 2 U.S.C. §§ 631-661 (1982)). The relevant provision states that "spending authority" means temporary or permanent authority related to government contractual obligations, the incurring of indebtedness, and the making of certain payments, such as for loans and grants, if such budget authority is "not provided for in advance by appropriations Acts." 2 U.S.C. § 651(c)(2). "Spending authority" does not include authority "to insure or guarantee the repayment of indebtedness incurred by another person or government." Id. § 651(c).

services will be based upon specified regulations. Id. § 251(a)(6)(D). Finally, certain spending deferrals proposed by the President are not to be included in the calculation. Id. All of these directions relate to the required calculation of "budget base levels of total revenues and total budget outlays" for a fiscal year.

The Act provides further guidance and limitation by way of definition. The "real economic growth" to be calculated is defined as "the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions." Act § 257(6). "Budget outlays" and "budget authority" are defined by reference to provisions of the Congressional Budget and Impoundment Control Act of 1974.[14] "Deficit" is defined as "the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year." Id. §§ 257(4), 201(a)(1). Moreover, the latter definition provides certain criteria for calculation of the deficit. See id. § 201(a)(1).[15]

These required assumptions and definitions are given additional meaning by reference to years of administrative and congressional experience in making similar economic projections and calculations under the Congressional Budget Act of 1974.[16] The present Act's references to the 1974 Act and to Department of Commerce

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14 Pub. L. No. 93-344, 88 Stat. 297 (codified in relevant part as amended at 2 U.S.C. §§ 621-688 (1982)). "Budget outlays" means, "with respect to any fiscal year, expenditures and net lending of funds under budget authority during such year." 2 U.S.C. § 622(1). "Budget authority" means "authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government." Id. § 622(2).

15 These criteria relate, inter alia, to treatment of Social Security funds and the "receipts, revenues, disbursements, budget authority, and outlays of each off-budget Federal entity." Act § 201(a)(1).

16 Under the 1974 Act, the CBO is required to perform a number of economic calculations. For example, near the beginning of each fiscal year, it must issue a report projecting for five fiscal years the total new budget authority and total budget outlays for each fiscal year in that period, revenues to be received in each fiscal year, the anticipated surplus or deficit, and the amount of "tax expenditures." 2 U.S.C. § 639(c) (1982).

regulations manifest Congress' intent that past practice should inform the administrators' calculations. The standards set by this Act thus "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." American Power & Light Co., 329 U.S. at 104; see also Lichter, 334 U.S. at 785 ("Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied."); Amalgamated Meat Cutters, 337 F. Supp. at 748 (standards set by statute are defined in part by consideration of experience under previous wage and price stabilization statutes). Additionally, we note that the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations. Here, as in Sunshine Anthracite Coal Co., 310 U.S. at 398, "in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act."

We are of the clear view that the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate "intelligible principle" to guide and confine administrative decisionmaking. It is unquestionably true, as plaintiffs point out, that in making the assessments of current facts and the predictions of future facts that the statute requires, a good deal of judgment is involved, and different individuals faithfully seeking to follow Congress' instructions may reach different results. Nevertheless, the discretion involved in assessing current facts and predicting future ones is inseparable from administration of the law, and it is one of the reasons we consider it important to elect our Chief Executive. If the facts and predictions here are difficult to ascertain, they are no more so than many others committed to the charge of administrative officials, such as the complex economic calculations required of the agencies that determine the discount rate, the consumer price index, and the gross national product. What is significant about this case, and what distinguishes it from many other cases in which delegation has been upheld, is that the

only discretion conferred is in the ascertainment of facts and the prediction of facts.[17] The Comptroller General is not made responsible for a single policy judgment as to, for example, what is a "fair price," see Yakus, 321 U.S. at 414, or when it would be "appropriate" to freeze wages and prices, see Amalgamated Meat Cutters, 337 F. Supp. at 737, or wherein lies the "public interest," see National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Compared with the cases upholding administrative resolution of such issues, the present delegation is remote from legislative abdication. Congress "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officials." Yakus, 321 U.S. at 425-26.

D

Finally, we consider plaintiffs' argument that the delegation is unlawful because of the preclusion of judicial review. Section 274(h) of the Act provides that "[t]he economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." This is of course not a total preclusion of judicial review with respect to all action taken under the Act. It does not restrict the bringing of constitutional challenges; indeed, in subsection 274(a), the Act endeavors to facilitate this type of judicial review by broadly designating those who may bring such suits. In addition, subsection 274(g) preserves the rights guaranteed by other laws; thus, there is nothing to prevent a court from determining whether the operation of the Act improperly infringes upon such rights. Moreover, by its terms, subsection 274(h) would not prevent a court from determining whether the Comptroller

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17 Of course the Comptroller General must interpret the law in applying the provisions of the Act, a point that will be relevant to the separation-of-powers discussion in Part IV of this opinion. Whether or not that power can appropriately be considered a "discretion," it is necessarily possessed by all officers charged with administration of the law and therefore cannot possibly cause problems of unconstitutional delegation.

General failed to make one of the assumptions required by subsection 251(a)(6). Additionally, since the judicial review preclusion extends only to determination of "base levels of total revenues and total budget outlays," a court presumably could determine whether the Comptroller General had complied with the deficit calculation criteria contained in subsection 201(a)(1). Nor are courts precluded from considering whether any allocation of spending reductions is made pursuant to statutory standards. Finally, the Act expressly provides for review of the presidential sequestration orders to determine their compliance with statutory requirements. See Act § 274(d).

The Act does insulate, however, those exercises of judgment by the Comptroller General that the plaintiffs challenge and that we have approved above. Plaintiffs argue that a condition of the validity of, if not all delegations, at least a delegation as broad as that here at issue, is the availability of judicial review of its exercise. We do not agree. To be sure, the Supreme Court has sometimes alluded to the availability of judicial review in its catalogue of factors such as "necessity" and "limited duration," discussed above, validating the delegation. In Opp Cotton Mills, for example, it said that

> where . . . the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by statute to be kept or which is in fact preserved, are such that Congress, the courts and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

312 U.S. at 144 (emphasis added). And more recently, in INS v. Chadha, it noted in dictum that the exercise of delegated authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953-54 n.16.

These allusions cannot be thought to establish the principle that judicial review is essential to sustain a delegation, since the exercise of many validly delegated authorities is statutorily insulated from judicial review. See, e.g., Southern Railway v. Seaboard Allied Milling Corp., 442 U.S. 449, 454-64 (1979) (construing provision of Interstate

Commerce Act); Thompson v. Clark, 741 F. 2d 401, 404-05 (D.C. Cir. 1984) (construing provision of Regulatory Flexibility Act). Even the more limited principle that judicial review can "save" a delegation that would otherwise be invalid is questionable, since if the requisite minimum standards have in fact not been established by Congress, permitting them to be invented by the courts rather than by the administrator is no less a delegation of political power, and arguably a worse one, since it is to a nonpolitical branch, and a branch even less subject to congressional controls. In any event, since we do not regard the present delegation as close to the line of invalidity, and since judicial review of almost all of the administrative determinations remains available, we find that insulating from judicial review the "economic data, assumptions, and methodologies used . . . in computing the base levels of total revenues and total budget outlays" provides no basis for finding the delegation invalid.

* * * * *

In sum, our review of the aggregate effect of the factors identified by the plaintiffs leads us to conclude that the delegation made by the Act passes constitutional muster. Apart from the technicalities of the matter, the realities produce the same conclusion. It seems to us not true, as plaintiffs have asserted, that Congress has declined to make the "hard political choices." To the contrary, it has decided to impose the severe constriction of federal spending necessary to produce a balanced budget by fiscal year 1991, it has established an intricate administrative mechanism to address that goal, and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much. See generally Act §§ 251(a)(3), 255, 256. All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation. While this is assuredly an

estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively political judgment, much less a political judgment of such scope that it must be made by Congress itself. Through specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function. It "has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense." Bowles v. Willingham, 321 U.S. at 514. Accordingly, plaintiffs' delegation challenge is rejected.

IV

We turn to the next major objection to the Act's automatic deficit reduction process, pressed in particular by the United States: that the role of the Comptroller General in that process is invalid because he does not possess the constitutional qualifications to perform it.[18] The objection takes various forms, but the only one we find it necessary to address is the contention that the Act confers upon the Comptroller General powers which are executive in nature, and which therefore cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires. Specifically, the government objects to the fact that the Comptroller General, while appointed by the President with the advice and consent of

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18 It is argued by some of the plaintiffs that the Act in reality confers power not upon the Comptroller General but rather upon the Directors of the OMB and the CBO, whose joint report the Comptroller General assertedly will "rubber-stamp." We find that assertion unconvincing, and thus direct our attention to the separation-of-powers concerns raised by the Comptroller General's formal powers under the Act. Of course, if it were true and relevant that the exercise of those powers would effectively be dictated by the Directors, our conclusion that the Act unconstitutionally vests executive powers in an official removable in a manner inconsistent with the exercise of such powers would be a fortiori correct, because the Director of the CBO is removable by resolution of either House. See 2 U.S.C. § 601(a)(4) (1982).

the Senate, is removable not only by impeachment (as are all officers of the United States) but also by joint resolution of Congress for specified causes, including inefficiency and neglect of duty.[19]

A

Three threshold objections are raised to our consideration of this issue as a basis for invalidating the automatic deficit reduction process. First, intervenors argue that, until removal is attempted, the issue of the effect of the Comptroller General's removability upon his powers is not ripe for adjudication. This argument is flatly contradicted by the decision in Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). There the Supreme Court adjudicated (and in fact found meritorious) the claim that bankruptcy judges who were appointed to fixed fourteen-year terms, subject to removal for cause by the judicial council of the circuit in which they served, and whose salaries were not immune from possible diminution, could not constitutionally exercise certain of the powers granted them by the Bankruptcy Act of 1978 — notwithstanding the fact that no removal or salary diminution had been attempted. 458 U.S. at 60-61, 87 (plurality opinion).

Intervenors seek to distinguish Northern Pipeline on the asserted ground that the Court focused its attention on what they describe as the constitutionally defective

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[19] The provision of law governing the Comptroller General's removal reads as follows:

> A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by —
> (A) impeachment; or
> (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for —
> (i) permanent disability;
> (ii) inefficiency;
> (iii) neglect of duty;
> (iv) malfeasance; or
> (v) a felony or conduct involving moral turpitude.

31 U.S.C. § 703(e)(1) (1982).

tenure provision that had already been exercised (viz., under their analysis, the provision appointing bankruptcy judges to a fixed term), rather than the ones that had not yet been exercised (viz., the provisions permitting removal during the fixed term and reduction of salary). As a factual matter, the assertion is not true. The Northern Pipeline Court focused no more of its attention on the fixed-term provision than on the removal-for-cause provision or the absence of statutory protection against diminution in salary; it simply noted all three problems, drawing no distinction among them on "ripeness" or any other grounds. Northern Pipeline, 458 U.S. at 60-61. Moreover, the very notion that the constitutional vice in Northern Pipeline had been "exercised," while in the present case the asserted constitutional vice has not been, strikes us as little more than semantic legerdemain. In the same sense in which the bankruptcy judges had already been appointed to positions with a fixed term, the Comptroller General has already been appointed to a position subject to congressional removal; and in the same sense that the congressional removal provision has not yet been applied in this case, neither had the provision requiring judges to step down after fourteen years in Northern Pipeline. It is true, of course, that the expiration of fourteen years was certain to occur while in the present case congressional removal is not. But that is quite irrelevant to whether the two provisions differ in their immediate impact, so that one is more "ripe" for review than the other. The immediate impact in Northern Pipeline came not from the certainty of expiration of fourteen years, but from the bankruptcy judge's awareness of the possibility of non-reappointment. It is his presumed desire to avoid that possibility by pleasing the appointing power, just as in the present case it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.[20]

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[20] Intervenors also seek to find support for their ripeness argument in Clark v. Valeo, 559 F.2d 642 (D.C. Cir.) (en banc) (per curiam), aff'd mem., 431 U.S. 950 (1977), and Muller Optical Co. v. EEOC, 743 F.2d 380 (6th Cir. 1984). It is not there. Clark, to be sure, rejected a challenge to a legislative veto provision as unripe because the provision (cont'd)

The second threshold argument, made by the Senate, is that, since the manner of removal that the Comptroller General's tenure statute embodies[21] is functionally the same as new legislation, there is no more reason for us to consider whether the existence of that tenure statute invalidates the present Act than there would be to consider, in the absence of such a statute, whether the possibility of Congress' passing a law removing the Comptroller General would invalidate the Act. We disagree. Insofar as justiciability and ripeness are concerned, the mere possibility that Congress might seek to remove an officer is no more comparable to its formal assertion (by legislation) of the power to do so, than is the mere possibility of an agency's punishing certain conduct comparable to its formal assertion (by rule) of the power to do so. Cf. Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). It is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance. And it is this, in turn, that constitutes the asserted evil of which the plaintiffs complain. The logic of the Comptroller General's argument leads to the conclusion that a tenure statute providing for removal of a judge exercising Article III powers by joint

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had not been exercised. But Clark involved a naked attack upon the provision itself and not, like the present case, a challenge to present use of the statutory powers to which the provision was attached. And Muller, which did address a challenge comparable to the present case, implicitly rejects rather than supports intervenors' ripeness argument, deciding on the merits a claim that the existence of an unexercised legislative veto provision in a statute rendered actions taken under that statute unconstitutional. Muller, 743 F.2d at 388. See also Alaska Airlines, Inc. v. Donovan, 766 F.2d 1550 (D.C. Cir. 1985) (holding on the merits that the existence of an unexercised legislative veto provision in a statute would render invalid actions taken under the statute unless the legislative veto provision were severable from the portion of the statute pursuant to which the challenged actions were taken), petition for cert. filed, 54 U.S.L.W. 3394 (U.S. Nov. 27, 1985) (No. 85-920).

21 The statute provides for removal by joint resolution, which requires either presidential approval or passage by a two-thirds vote of both Houses of Congress over a presidential veto. In assessing the compatibility of such a provision with the constitutional doctrine of separation of powers, we think it most appropriate to focus our attention on the latter possibility — that Congress could remove the Comptroller General despite presidential opposition — and we therefore refer to the provision as authorizing congressional removal.

resolution could similarly not be challenged, a prospect we are not prepared to entertain.

Intervenors' last threshold argument is that, even if the powers granted to the Comptroller General under the Act cannot be conferred upon an officer removable by Congress, that conclusion does not necessarily invalidate the Act, but rather requires us to choose *which* of the two incompatible provisions (the powers in the Act or the removal authority) should be set aside. That decision, they assert, should turn primarily upon our estimation of which of the two provisions Congress would have wished to survive — which they maintain is the Act.

Intervenors do not refer us to, nor are we aware of, any case in which a court confronted with separate statutes, constitutionally incompatible in combination, has even considered choosing which of the two to invalidate, much less resolved that choice as intervenors suggest. To the contrary, as the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate, the courts set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff. *See* *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928) (removing from office, in *quo warranto* proceeding brought by Philippine Governor-General, officials exercising executive power but appointed by officers of Philippine legislature); *Myers v. United States*, 272 U.S. 52 (1926) (setting aside tenure-of-office statute that was the basis of postmaster's claim of unlawful presidential removal). Indeed, the Supreme Court has taken that approach even when the incompatible authorization and removal (or appointment) provisions are contained within *the same* enactment. *See* *Northern Pipeline*, 458 U.S. at 50 (setting aside exercise of adjudicatory authority over plaintiff by bankruptcy judge who lacked Article III life tenure); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam) (setting aside Federal Election Campaign Act provisions granting authority over plaintiffs to officials appointed in a manner incompatible with the exercise of such authority).

Even if we were to agree, however, that when confronted with two separate

provisions that cannot both be constitutionally sustained, we are free to choose between them, and are to make our choice on the basis of presumed congressional intent, we would conclude that in the present case it is the grant of powers under the Act that would have to fall. As the brief of Intervenor Speaker and Bipartisan Leadership Group of the House meticulously details, the grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself — much less if he were removable (as validation of his functions under this legislation might constitutionally require, a point we do not reach) at the discretion of the President, like the Director of the OMB himself.

A congressional intent that it is the Comptroller General's powers under this Act, rather than his manner of removal, that should yield if both cannot coexist is also strongly suggested by the fallback deficit reduction process specifically established by the Act to take effect if the automatic deficit reduction process is declared constitutionally infirm — especially since it is clear that one of the grounds of possible infirmity specifically brought to Congress' attention by the executive branch was the participation of the Comptroller General.[22] By reason of that fallback process, we might add, setting aside the grant of powers to the Comptroller General would result in a state of affairs that Congress unquestionably was willing to accept, whereas congressional acceptance of an automatic deficit reduction process administered by a Comptroller General unremovable by Congress (and perhaps removable at will by the

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[22] See Statement on Signing H.J. Res. 372 Into Law, 21 Weekly Comp. Pres. Doc. 1490-91 (Dec. 12, 1985) ("[E]xecutive functions may only be performed by officers in the executive branch. The . . . Comptroller General [is an] agent[ ] of Congress, not [an] officer[ ] in the executive branch. . . . My administration alerted Congress to [this] . . . problem[ ] throughout the legislative process in an effort to achieve a bill free of constitutionally suspect provisions. . . . [W]e were unsuccessful in this goal . . . .").

President) is purely speculative. Indeed, even apart from the fallback process a decision setting aside the grant of powers under this Act rather than the separate statutory provision for the Comptroller General's removal would run much less risk of frustrating congressional intent. We have no idea how many powers of the Comptroller General, conferred upon him by other statutes, would not have been conferred if he were not subject to congressional removal.

We conclude, therefore, that the question whether the powers conferred upon the Comptroller General by the Act are constitutionally incompatible with his removability from office by Congress is ripe for our consideration; and that an affirmative answer requires invalidation of those powers. We turn to the merits of this issue.

B

The only portions of the Constitution explicitly addressing the power to remove officers of the United States[23] are the impeachment clauses, which provide that "The President, Vice President and all civil Officers of the United States, shall be removed

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[23] "Officers" are to be distinguished from "employees," see Buckley v. Valeo, 424 U.S. at 126 & n.162, as to whom the congressional power to restrict or impose removal may be quite different. The distinction is not relevant to the present case, however, since it is conceded that the Comptroller General is an officer. There may also be a difference, at least insofar as Congress' ability to restrict the President's removal power is concerned, between those officers included within the meaning of the phrase "inferior Officers" in the appointments clause of the Constitution, whose manner of appointment that clause permits to be controlled to some degree by Congress (viz., to be vested "in the President alone, in the Courts of Law, or in the Heads of Departments," Art. II, § 2, cl. 2); and other officers, whom the appointments clause requires to be appointed by the President with the advice and consent of the Senate, id. See, e.g., Myers, 272 U.S. at 158-64; United States v. Perkins, 116 U.S. 483, 484-85 (1886) (dictum). That distinction also is not pertinent here, since no one contends, and it seems to us not seriously maintainable, that the Comptroller General is an "inferior Officer." Finally, there may be a distinction between "officers of the United States" and "officers of Congress," see Buckley v. Valeo, 424 U.S. at 127-28. Although it is not conceded that the Comptroller General comes within the former category (the government vigorously asserts the contrary), we find it unnecessary to decide the question, since if the Comptroller General is not an officer of the United States he is a fortiori unable to exercise the executive powers we find him unable to exercise on narrower grounds. Our analysis assumes, in other words, the more validating characterization of the office.

from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4, and that the House of Representatives shall bring, and the Senate try, the impeachment, Art. I, § 2, cl. 5; Art. I, § 3, cl. 6. The appointments clause of the Constitution, which it is universally agreed has some bearing upon removal powers, reads as follows:

> . . . [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Art. II, § 2, cl. 2.

Since the early days of the Republic it has not been doubted that the Constitution implicitly confers upon the President power to remove civil officers whom he appoints, at least those who exercise executive powers. In what has come to be known in the legal literature as the "Decision of 1789," the First Congress, after heated debate, deleted from a proposed bill creating the Department of Foreign Affairs language which provided that the Secretary of Foreign Affairs was "to be removable from office by the President." The reason urged by the proponents of the deletion was that the original text implied the absence of a constitutionally conferred power of the President to effect the removal. See Myers, 272 U.S. at 111-36.

The extent to which the implicit presidential removal power extends beyond officers exercising executive powers, however, the extent to which it can be restricted by legislation, and the extent to which it can be conferred by legislation upon the Congress itself, have been the subject of Supreme Court pronouncements that are conflicting in their reasoning, if not in their results. See generally Burkoff, Appointment and Removal under the Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335 (1976); Donovan & Irvine, The President's Power to Remove Members of Administrative Agencies, 21 Cornell L.Q. 215 (1936). The cases are few enough that

their holdings and their principal rationales may be readily summarized.

In In re Hennen, 38 U.S. (13 Pet.) 230 (1839), the Court held that a district court clerk, who had been appointed by a district court judge pursuant to that provision of the Constitution authorizing Congress to vest the appointment of "inferior Officers . . . in the Courts of Law," could also be removed by a district court judge. The Court said that "[i]n the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment." Id. at 259.

In United States v. Perkins, 116 U.S. 483 (1886), the Court upheld an award of back pay to a cadet-engineer in the Navy, who had been appointed by the Secretary of the Navy and was dismissed by him in disregard of a statutory provision prohibiting dismissal of any naval officer in peacetime except by court martial. The Court quoted and approved the opinion of the Court of Claims stating that, regardless of what the situation might be with regard to officers appointed by the President by and with the advice and consent of the Senate under the self-operative provision of the Constitution,

> 'when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.'

Id. at 485.

In Shurtleff v. United States, 189 U.S. 311 (1903), the Court held that a statute which provided that a particular Customs Department official "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office" did not prevent presidential removal for other reasons, since such a limitation would have to be stated in "very clear and explicit language," id. at 315. The Court did not confront, therefore, the issue of whether such a limitation would be constitutional.

In Myers v. United States, 272 U.S. 52 (1926), the Court finally dealt with the constitutionality of a statutory provision giving Congress a role in the removal process.

The plaintiff was a postmaster, appointed by the President with the advice and consent of the Senate, for a four-year term; he was dismissed by the President despite a tenure-of-office act requiring advice and consent of the Senate for his removal. The Court found the limitation unconstitutional in a 71-page opinion by Chief Justice Taft exhaustively examining the historical record bearing upon the meaning of the applicable constitutional texts. The nub of the analysis is that, as the Decision of 1789 in the Court's view established, and as In re Hennen had held, "the power of removal [is] incident to the power of appointment," 38 U.S. (13 Pet.) at 259. The Constitution gives Congress no authority to limit that removal power, except, implicitly, in the provision authorizing Congress to provide for the appointment of inferior officers by means other than the constitutionally prescribed method of presidential appointment with Senate consent. At least where it exercises that authority in such fashion as to vest appointment in the head of a department, it "may prescribe incidental regulations controlling and restricting the [appointing officer] in the exercise of the power of removal." 272 U.S. at 161. Even in the latter situation, the Court added, for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." Id. The opinion clearly regarded its holding as applicable to officers whose functions include "duties of a quasi-judicial character," id. at 135, including specifically the commissioners of the Interstate Commerce Commission, see id. at 171-72.

The next case, decided nine years later, warrants more extended attention, since it is the last major discussion by the Supreme Court of the constitutional authority of Congress over power of removal. Humphrey's Executor v. United States, 295 U.S. 602 (1935), was a suit for back pay by a commissioner of the Federal Trade Commission whom President Roosevelt had removed without cause. The Federal Trade Commission Act provided that commissioners "may be removed by the President for inefficiency,

neglect of duty, or malfeasance in office." The Court's opinion, by Justice Sutherland, first found that this language, unlike the virtually identical language involved in Shurtleff, did bar removal for other causes, distinguishing the earlier case on the basis that the office there involved had no term of appointment, whereas Federal Trade Commissioners were limited to a term of seven years. Humphrey's Executor, 295 U.S. at 619-26. Then, in six pages addressing the constitutional issue — two of which were spent discussing why the facts of Myers were distinguishable — the opinion swept away much of the reasoning of Myers (precisely how much is one of the issues before us) and simultaneously revolutionized separation-of-powers analysis. The Court said that the holding of Myers extended only to "purely executive officers," and that the constitutional prohibition it expressed did not apply to an officer like the Federal Trade Commissioner, who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President," but acts only "in the discharge and effectuation of . . . quasi-legislative[24] or quasi-judicial powers, or as an [officer of an] agency of the legislative or judicial departments of the government." 295 U.S. at 628.[25] As to the latter, it said, "illimitable power of removal is not possessed by

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24 It is noteworthy, though generally not noted, that the "quasi-legislative" powers referred to in Humphrey's Executor were not substantive rulemaking powers, which the Federal Trade Commission itself did not assert it possessed until 1962, see National Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974), but rather the responsibility to conduct investigations for the purpose of recommending legislation to Congress. See 295 U.S. at 621, 628. Though the holding of Humphrey's Executor is necessarily limited to this sort of function, it is generally assumed (though without any Supreme Court holding to sustain the point) that rulemaking is a "quasi-legislative activity" for purposes of the rule of Humphrey's Executor. See, e.g., INS v. Chadha, 462 U.S. 919, 953 n.16 (1983).

25 The Court did note that the President was authorized to direct the Federal Trade Commission to investigate and report alleged antitrust violations, but described that activity to be an "executive function — as distinguished from executive power in the constitutional sense — [exercised] in the discharge and effectuation of [the Federal Trade Commission's] quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." Humphrey's Executor, 295 U.S. at 628 & n.*. In this opinion, we are careful to direct our attention to the question whether the power that the Comptroller General exercises under the Act is "executive power in the constitutional sense."

the President," and Congress may "fix the period during which [the officer] shall continue in office, and . . . forbid . . . removal except for cause in the meantime." Id. at 629. This was said to be required by the doctrine of separation of powers, since "sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there," and since the "coercive influence [of unlimited presidential power of removal] threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which . . . was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." Id. at 630.

The last Supreme Court decision involving the removal power was handed down almost three decades ago. Wiener v. United States, 357 U.S. 349 (1958), was another back-pay suit, by a commissioner of the War Claims Commission who had been removed by President Eisenhower without cause. It was uncontested that the Commission exercised only "quasi-judicial" functions, and the point at issue was whether Congress had prohibited presidential removal without cause. Despite the absence of any explicit prohibition, the Court found that

> [i]f, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, a fortiori must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

357 U.S. at 356.[26] Accordingly, Humphrey's Executor was held to render the removal unlawful.

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26 In other language, the Wiener Court suggested its view that, at least with respect to officers exercising "quasi-judicial" powers, the Constitution simply did not vest the President with a power of removal, even one that might be expressly or implicitly limited in appropriate circumstances by Congress. 357 U.S. at 352-53, 356. This language seems squarely at odds with a long line of authority, beginning with In re Hennen, 38 U.S. (13 Pet.) 230 (1839), and unchallenged even by Humphrey's Executor, which was careful to limit its decision to the question whether the Constitution vested in the President an "illimitable" power of removal. Humphrey's Executor, 295 U.S. at 629. We are unwilling to suppose that that line of authority has been overruled by the language in Wiener.

These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. It is not clear, moreover, that these shifts are at an end. Justice Sutherland's decision in Humphrey's Executor, handed down the same day as A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935), is stamped with some of the political science preconceptions characteristic of its era and not of the present day — if not stamped as well, as President Roosevelt thought, with hostility towards the architect of the New Deal.[27] It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process. Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies. Finally, the expansion of due process protections, see, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970), statutorily prescribed procedures for both rulemaking and adjudication, see 5 U.S.C. §§ 553-559 (1982), and an elaborate system of judicial review, see 5 U.S.C. §§ 701-706 (1982), have provided in more targeted fashion some of the protection against political intervention, when it is inappropriate, which Humphrey's Executor sought to provide wholesale. It has

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[27] Justice Jackson, who had been Roosevelt's attorney general, remarked:

> I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of Humphrey's Executor v. United States. The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft.

E. Gerhart, America's Advocate: Robert H. Jackson 99 (1958).

in any event always been difficult to reconcile Humphrey's Executor's "headless fourth branch" with a constitutional text and tradition establishing three branches of government — assuming, as the rationale though not the narrow holding of Humphrey's Executor requires, that the presidential removal for cause permitted under the statute upheld there did not include removal because of the appointee's failure to accept presidential instructions regarding matters of policy or statutory application delegated to him by Congress.

Some knowledgeable observers, see, e.g., Strauss, The Place of Agencies in Government: Separation of Powers and the Fourth Branch, 84 Colum. L. Rev. 573, 633-40 (1984), think that abandonment of the Humphrey's Executor analysis has been presaged by the Supreme Court's 1983 decision in INS v. Chadha, 462 U.S. at 919, which declared invalid the legislative veto of agency action characterized in the majority and one of the dissenting opinions as "quasi-legislative," see id. at 953 n.16 (majority); id. at 989 (White, J., dissenting), and in the concurrence as "judicial in nature," see id. at 966 n.10 (Powell, J., concurring). See also Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216 (1983), aff'g mem. Consumers Union of United States, Inc. v. FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (applying the holding of Chadha to legislative veto of rulemaking by an "independent" regulatory agency). Assuredly some of the language of the majority opinion in Chadha does not lie comfortably beside the central revelation of Humphrey's Executor that an officer such as a Federal Trade Commissioner "occupies no place in the executive department," and that an agency which exercises only "quasi-legislative or quasi-judicial powers" is "an agency of the legislative or judicial departments of the government," 295 U.S. at 628.[28]

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[28] See, e.g., the following:

> To be sure, some administrative agency action — rulemaking, for example — may resemble "lawmaking." . . . This Court has referred to agency activity as being "quasi-legislative" in character. Humphrey's Executor v. United States, 295 U.S. 602, 628 (1935). Clearly, however, "[i]n the

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The Supreme Court's signals are not sufficiently clear, however, to justify our disregarding the rationale of Humphrey's Executor, and we view our present task as one of placing the facts before us into the framework established by Humphrey's Executor and by the holdings of earlier cases (including Myers) which Humphrey's Executor did not purport to overrule. In approaching that task, it becomes apparent at the outset that the present case falls neatly between the two stools of Myers and Humphrey's Executor. The Comptroller General is neither a "purely executive officer[ ]" whom Myers (as reinterpreted by Humphrey's Executor, see 295 U.S. at 627-28) requires to be subject to discretionary presidential removal; nor an officer such as that said to be involved in Humphrey's Executor, who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President," id. at 628. Rather, his status, insofar as the removal powers of the President are concerned, falls precisely within the no-man's land described in the last substantive paragraph of the Humphrey's Executor opinion:

> To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

Id. at 632.

> framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). See Buckley v. Valeo, 424 U.S., at 123. When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. . . . It is clear . . . that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. . . . Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.

462 U.S. at 953-54 n.16.

It is unquestionable that some of the Comptroller General's powers — indeed, we will posit for purposes of the present decision, all except those at issue here — consist of (in the words of Humphrey's Executor) "specified duties as a legislative . . . aid," in the performance of which he "cannot in any proper sense be characterized as an arm or an eye of the executive." Id. at 628.[29] The Comptroller General's powers under the automatic deficit reduction process, however, do not come within that category. Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts. The first of these specifications requires the exercise of substantial judgment

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29 See, e.g., 2 U.S.C. § 686 (1982) (Comptroller General shall report unlawful impoundment of funds to both Houses of Congress); 2 U.S.C. § 687 (1982) (Comptroller General may sue the United States to force obligation of unlawfully impounded funds); 31 U.S.C. § 712(2) (1982) (Comptroller General shall estimate cost of compliance with expenditure restrictions in appropriations bills, report to Congress and make recommendations); 31 U.S.C. § 712(3) (1982) (Comptroller General shall analyze the efficiency of executive-agency expenditures of interest to Congress); 31 U.S.C. § 712(4) (1982) (Comptroller General shall make investigations at the request of either House or an appropriate committee thereof); 31 U.S.C. § 712(5) (1982) (Comptroller General shall give assistance and information to appropriate congressional committees); 31 U.S.C. § 716 (1982) (Comptroller General may sue heads of agencies to obtain audit information); 31 U.S.C. § 717(b) (1982) (Comptroller General shall evaluate the results of government activities at the request of either House of Congress or appropriate committees thereof); 31 U.S.C. § 717(c)-(d) (1982) (Comptroller General shall assist Congress and congressional committees in developing methods for the assessment of the results of governmental activities); 31 U.S.C. § 719 (1982) (Comptroller General shall make various reports to Congress and congressional committees).

The special relationship between the Comptroller General and Congress that is expressed in these statutes makes natural the frequent description of the Comptroller General and the General Accounting Office as "part of" or "an agency of" the legislative branch. See, e.g., Bowsher v. Merck & Co., 460 U.S. 824, 844 (1983); McDonnell Douglas Corp. v. United States, 754 F.2d 365, 368 (Fed. Cir. 1985); United States v. McDonnell Douglas Corp. v. United States, 751 F.2d 220, 224 (8th Cir. 1984); Delta Data Sys. Corp. v. Webster, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984); but cf., e.g., Lear Siegler, Inc. v. Lehman, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); Ameron, Inc. v. United States Army Corps of Eng'rs, 607 F. Supp. 962 (D.N.J. 1985), appeal filed, No. 85-5226 (3d Cir.); United States ex rel. Brookfield Constr. Co. v. Stewart, 234 F. Supp. 94, 99-100 (D.D.C.), aff'd, 339 F.2d 753 (D.C. Cir. 1964) (per curiam). We need not and do not decide, however, whether such characterizations are accurate.

concerning present and future facts that affect the application of the law — the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretion of the law enacted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he "take Care that the Laws be faithfully executed." Art. II, § 3. And both of these specifications by the Comptroller General are, by the present law, made binding upon the President in the latter's application of the law. Act § 252(a)(3). Indeed, the Comptroller General is explicitly directed to report to Congress on the extent to which the President follows his instructions. Act § 253. In our view, these cannot be regarded as anything but executive powers in the constitutional sense.

We are, therefore, in the no-man's land described by Humphrey's Executor, confronting an officer whose powers are neither exclusively executive nor exclusively nonexecutive. The Comptroller General argues, in essence, that this territory should be awarded to the "exclusively nonexecutive" side — that so long as the officer in question exercises some, or at least a substantial number of, nonexecutive powers, the constitutional restrictions upon the manner of his removal are the same as those applicable in Humphrey's Executor. We cannot accept that view.

What has been at issue in the congressional-executive dispute over the power of removal that began in the First Congress is not control over the officer but, ultimately, control over the governmental functions that he performs. And the object of all the Supreme Court's opinions on the subject has been to assure, in the words of Justice Story quoted in Humphrey's Executor, "that neither of the departments in reference to each other '[shall] possess, directly or indirectly, an overruling influence in the administration of their respective powers.'" 295 U.S. at 630 (quoting J. Story, Commentaries on the Constitution of the United States § 530 (4th ed. 1873)). The pursuit of that principle becomes a foolish game if all that is necessary for Congress to acquire an "overruling influence" over the administration of a constitutional executive power, no matter how

significant it may be, is to confer that power upon an official who exercises one or more nonexecutive powers as well. Nor are we disposed to resolve this matter on the basis of whether there is an "adequate" admixture of nonexecutive powers, or whether nonexecutive powers "predominate"; those are neither judicially manageable nor congressionally knowable standards. Thus, under the Comptroller General's theory the heads of most major executive agencies, since they exercise some quasi-legislative or quasi-judicial powers, would currently qualify for Humphrey's Executor treatment — and it is impossible to imagine any executive officer who could not be made to qualify by sagacious congressional conferral of nonexecutive powers in the future. On the Comptroller General's theory, not only he but also the Director of the OMB could be subjected to congressional removal.

Having concluded that we are in the middle ground, and that the middle ground cannot uniformly be accorded Humphrey's Executor treatment, we must decide precisely what treatment the present facts demand. At this point another distinction between Humphrey's Executor and the present case becomes relevant: the former upheld a statute that imposed no more than a partial restriction upon the presidential power of removal — removal without cause was prohibited, but presidential removal for "inefficiency, neglect of duty, or malfeasance in office" was allowed. The statute governing removal of the Comptroller General, by contrast, eliminates all presidential power of removal, and — much beyond that — confers the power of removal upon Congress. The enormous difference between the two, insofar as impact upon the balance of powers is concerned, is apparent. As was observed by the Court in Myers, which, unlike Humphrey's Executor, did involve the assertion of removal power by the Congress:

> The Court . . . has recognized in the Perkins case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the Court never has held, nor reasonably could hold . . . , that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power.

272 U.S. at 161. It remains true that the Supreme Court has never sanctioned congressional assertion of such a power. We think it at least questionable whether the power would be approved even with respect to officers of the United States who exercise only "quasi-legislative" powers in the Humphrey's Executor sense — since it would dramatically reduce the value of the right to appoint such officers which the Constitution has assured to the Executive or to the Courts of Law, a right that the Supreme Court has regarded as an important element of the balance of powers, prompted by the founders' often expressed fear "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Buckley v. Valeo, 424 U.S. at 129. We are confident, however, that congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws. Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey. Giving such power over executive functions to Congress violates the fundamental principle expressed by Montesquieu upon which the theory of separated powers rests: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, The Spirit of Laws, vol. I, bk. XI, ch. 6, at 152 (London 1823). See also The Federalist No. 48, at 327 (J. Madison) (P. Ford ed. 1898) ("[N]one of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.").

The Comptroller General argues, however, that a congressional removal power limited to cause (which is what we have here) no more enables Congress to control executive powers than did the presidential removal power for cause, which was retained by the statute at issue in Humphrey's Executor, enable the President to control the exclusively "quasi-legislative" and "quasi-judicial" powers of the Federal Trade

Commission. It is not clear, to begin with, that a "quasi-legislative" power is the same as a legislative power in the constitutional sense, so that the intrusion upon the Executive here is parallel to the intrusion upon the Congress there.[30] Assuming, however, that it is, there are several answers to the Comptroller General's objection. Humphrey's Executor neither faced nor considered the question whether the limitations imposed by the doctrine of separation of powers on the scope of executive authority over the removal of nonexecutive officers are precisely equal to the analogous limitations on the scope of congressional authority over the removal of executive officers. Parity is no more to be expected there than it is with respect to the scope of the power to appoint, as to which the Constitution grants only a subordinate role to the Congress. It is the starting point of all judicial analysis in this area, see, e.g., In re Hennen, 38 U.S. (13 Pet.) 230 (1839), that the President's power to remove, however much it may be restricted, derives from the constitutional grant of his power to appoint; and we think the permissible impact of that power to remove upon an officer's independence, in comparison to the permissible impact of any such congressional power, may properly reflect the greater strength of that pedigree.[31] Moreover, insofar as effect upon

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30 Justice Jackson aptly characterized the ambiguity of the "quasi-legislative" and "quasi-judicial" categories enshrined in constitutional jurisprudence by Humphrey's Executor as follows:

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

FTC v. Ruberoid Co., 343 U.S. 470, 487-88 (1952) (Jackson, J., dissenting).

31 Of course, the Constitution vests Congress with the power to bring and try impeachments of all officers of the United States. We think it apparent, however, that this very limited power of removal, which may be exercised only through the trial and conviction of an officer for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4; simply cannot be compared to the congressional removal power at issue in this case in its effect upon the independence of executive officers. Moreover, the (cont'd)

balance of powers is concerned, congressional power to remove is much more potent, since the Executive has no means of retaliation that may dissuade Congress from exercising it — other than leaving the office vacant, thereby impairing the Executive's own functions. Congress, on the other hand, has many ways to make the President think long and hard before he makes a "for cause" removal that Congress disapproves, ranging from budget constriction to refusal to confirm a successor.

It seems to us entirely clear under the recent landmark decision in INS v. Chadha, 462 U.S. 919 (1983), that if the present statute had not inserted the Comptroller General between the President and the report of the Directors of the CBO and the OMB, and if the determinations to be made under the Act by the Comptroller General had been assigned instead to the President himself, Congress could not constitutionally provide for legislative veto of those determinations. It is also unthinkable that Congress could constitutionally provide for veto of those determinations by an officer removable by Congress — the Comptroller General, for example. It seems to us no more constitutionally permissible to achieve the same result ex ante instead of ex post, prescribing in advance the exercise of executive power, instead of invalidating its exercise.

We hold, therefore, that since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented. As earlier noted, we need not deliberate concerning the effect of this invalidation upon other portions of the Act, since the Act itself provides the answer: replacement of the automatic deficit reduction process with the fallback deficit reduction process, and preservation of the remainder of the Act intact. The Act

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existence of such a carefully limited congressional removal power undermines rather than supports the proposition that Congress may attempt to assert an additional power of removal.

also requires, § 274(e), that we stay the order implementing our judgment pending the outcome of any appeal.

* * * * *

We do not minimize the effect of our invalidation of one small section of the Act upon the entire statutory scheme. Our holding today eliminates the automatic deficit reduction process, and gives effect to the prescriptions of the Directors of the OMB and CBO only to the extent that they are adopted by joint resolution, i.e., legislation, under the fallback deficit reduction process. It may seem odd that this curtailment of such an important and hard-fought legislative program should hinge upon the relative technicality of authority over the Comptroller General's removal — particularly when we have rejected the more intuitive "excessive delegation" arguments that were the focus of the attacks upon the legislation by its opponents on the floor of Congress and by the plaintiffs here. But the balance of separated powers established by the Constitution consists precisely of a series of technical provisions that are more important to liberty than superficially appears, and whose observance cannot be approved or rejected by the courts as the times seem to require. Both of these points have been eloquently expressed by a respected scholar in course of discussing application of the Constitution's guarantee against removal of judges to officials appointed under Article I but in fact exercising Article III judicial powers:

> Mid-twentieth century Americans have become accustomed to assuming that the central constitutional method of protecting individual freedoms from being overridden by government ukase is to prevent governmental intrusions into certain defined zones of individual conduct. Thus, we quite rightly applaud actions enshrining constitutional rights to freedom of speech, religion, privacy, and equal protection.
>
> Those who wrote the Constitution, however, did not employ this technique. Rather, they emphasized the virtues of limiting governmental power and then dividing the remaining power among autonomous government compartments. Hence, most of our constitutional rights of individual liberty or autonomy are stated in constitutional amendments.

> The body of the Constitution as originally written is principally an exercise in applying the concepts of federalism and separation of powers to the new American nation. The framers were not disciples of John Stuart Mill, who had not yet been born, but of Montesquieu, whom they had read carefully.
>
> . . . .
>
> . . . [P]art of the value of a clearly expressed, constitutional separation-of-powers principle often inheres in its apparent rigidity or inability to adapt easily to different solutions. As a nation, one question we must face every day is how far judges and legislators should be separated. Many rational answers to that question are possible. The United States has chosen, by the device of a written constitution, and on the basis of specific historical experience, to resolve that question at one time and in one way for almost all cases. To respect that judgment promotes stability, predictability and consistency, and avoids constant re-examination of troublesome policy issues underlying the question.

Krattenmaker, Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional, 70 Geo. L.J. 297, 301-02, 311 (1981).

We observe, moreover, that although we have rejected the argument based upon the doctrine of unconstitutional delegation, the more technical separation-of-powers requirements we have relied upon may serve to further the policy of that doctrine more effectively than the doctrine itself. Unconstitutional delegation has been invoked by the federal courts to invalidate legislation only twice in almost 200 years, and the possibility of such invalidation, at least in modern times, is not a credible deterrent against the human propensity to leave difficult questions to somebody else. The instances are probably innumerable, however, in which Congress has chosen to decide a difficult issue itself because of its reluctance to leave the decision — as our holding today reaffirms it must — to an officer within the control of the executive branch.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant, UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, Intervenors.	Civil Action No. 85-3945

FILED
FEB 7 1986
JAMES E. DAVEY, Clerk

NATIONAL TREASURY EMPLOYEES UNION, Plaintiff, v. UNITED STATES OF AMERICA, Defendant, UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, Intervenors.	Civil Action No. 85-4106

ORDER

Upon consideration of the pending dispositive motions filed by the parties in the above actions, the memoranda of points and authorities in support thereof and in

opposition thereto, and the entire record herein, and all parties having been heard in open court thereon, and for the reasons stated in the accompanying opinion, it is by the court this 7th day of February, 1986,

ORDERED that the automatic deficit reduction process established by the Balanced Budget and Emergency Deficit Control Act of 1985, under which the President is required to issue a sequestration order implementing the budget reduction specifications of a report prepared by the Comptroller General, be, and hereby is, declared unconstitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress; and it is further

ORDERED that the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect; and it is further

ORDERED that such action is without prejudice to implementation of the alternate deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation declared above;

ORDERED, pursuant to subsection 274(e) of the Act, that the effect of this judgment be, and hereby is, stayed during the pendency of any appeal taken under subsection 274(b) of the Act.

Antonin Scalia
Antonin Scalia, Circuit Judge of
the United States Court of Appeals
for the District of Columbia
Circuit

Norma Holloway Johnson
Norma Holloway Johnson, District
Judge of the United States District
Court for the District of Columbia

Oliver Gasch
Oliver Gasch, Senior District Judge
of the United States District Court
for the District of Columbia

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, _et al_., Plaintiffs,	)	
v.	)	Civil Action No. 85-3945
UNITED STATES OF AMERICA, _et al_., Defendants.	)	

NATIONAL TREASURY EMPLOYEES UNION, Plaintiff,	)	
v.	)	Civil Action No. 85-4106
UNITED STATES OF AMERICA, Defendant.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that intervening-defendant Charles A. Bowsher, the Comptroller General of the United States, appeals to the Supreme Court of the United States from the order entered in these actions on February 7, 1986, declaring that the deficit reduction process established by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 ("the Act"), is unconstitutional on the ground that it vests executive power in the Comptroller General, an officer

removable by Congress, and that the presidential sequestration order issued on February 1, 1986 pursuant to that deficit reduction process is without legal force and effect.

This appeal is taken pursuant to Section 274(b) of the Act.

Respectfully submitted,

Harry R. Van Cleve
General Counsel

James F. Hinchman
Deputy General Counsel

Robert P. Murphy
Attorney-Adviser
U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548
Tel. (202) 275-5207

Lloyd N. Cutler

Lloyd N. Cutler
John H. Pickering
William T. Lake
Michael S. Helfer
Daniel M. Drory
Richard K. Lahne

Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
Tel. (202) 872-6000

Attorneys for the Comptroller General of the United States

February 7, 1986

H. J. Res. 372

PUBLIC LAW 99-177

Ninety-ninth Congress of the United States of America

AT THE FIRST SESSION

Begun and held at the City of Washington on Thursday, the third day of January, one thousand nine hundred and eighty-five

Joint Resolution

Increasing the statutory limit on the public debt.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 3101 of title 31, United States Code, is amended by striking out the dollar limitation contained in such subsection and inserting in lieu thereof "$1,847,800,000,000, or $2,078,700,000,000 on and after October 1, 1985,".

SEC. 2. MINIMUM CORPORATE TAX BY CORPORATIONS.

(a) Notwithstanding any other provision of this joint resolution, the Senate Committee on Finance is directed to report to the Senate by July 1, 1986, legislation providing for payment of an alternative minimum corporate tax by corporations on the broadest feasible definition of income to assure that all of those with economic income pay their fair share of taxes: *Provided,* That said alternative minimum corporate tax shall take effect for corporate tax years commencing on or after October 1, 1986. The revenue raised by this tax shall be applied to reduce the Federal deficit.

(b) Notwithstanding any other provision of this joint resolution, the Committee on Ways and Means is directed to report to the House of Representatives legislation providing for payment of an alternative minimum corporate tax by corporations based upon the broadest feasible definition of income to assure that all of those with economic income pay their fair share of taxes: *Provided,* That, the Committee on Ways and Means shall report such legislation prior to October 1, 1986.

SEC. 3. ACHILLE LAURO HIJACKING.

(a) The Senate finds that—

(1) the four men identified as the hijackers of the Achille Lauro were responsible for brutally murdering an innocent American citizen, Leon Klinghoffer, and for terrorizing hundreds of innocent crew members and passengers for two days;

(2) the United States urges all countries to aid in the swift apprehension, prosecution, and punishment of the terrorists; and

(3) the United States should not tolerate any country providing safe harbor or safe passage to the terrorists.

(b) It is the sense of the Senate that—

(1) the United States demands that no country provide safe harbor or safe passage to these terrorists;

(2) the United States expects full cooperation of all countries in the apprehension, prosecution, and punishment of these terrorists;

(3) the United States cannot condone the release of terrorists or the making of concessions to terrorists; and

(4) the United States identify those individuals responsible for the seizure of the Achille Lauro and the cold-blooded murder of

Leon Klinghoffer, as well as those countries and groups that aid and abet such terrorist activities, and take the strongest measures to ensure that those responsible for this brutal act against an American citizen are brought to justice.

TITLE II—DEFICIT REDUCTION PROCEDURES

SEC. 200. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This title may be cited as the "Balanced Budget and Emergency Deficit Control Act of 1985".

(b) TABLE OF CONTENTS.—

PART A—CONGRESSIONAL BUDGET PROCESS

Subpart I—Congressional Budget

SEC. 201. CONGRESSIONAL BUDGET.

(a) DEFINITIONS.—

(1) Section 3 of the Congressional Budget and Impoundment Control Act of 1974 is amended by adding at the end thereof the following new paragraphs:

"(6) The term 'deficit' means, with respect to any fiscal year, the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year. In calculating the deficit for purposes of comparison with the maximum deficit amount under the Balanced Budget and Emergency Deficit Control Act of 1985 and in calculating the excess deficit for purposes of sections 251 and 252 of such Act (notwithstanding section 710(a) of the Social Security Act), for any fiscal year, the receipts of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for such fiscal year and the taxes payable under sections 1401(a), 3101(a), and 3111(a) of the Internal Revenue Code of 1954 during such fiscal year shall be included in total revenues for such fiscal year, and the disbursements of each such Trust Fund for such fiscal year shall be included in total budget outlays for such fiscal year. Notwithstanding any other provision of law except to the extent provided by section 710(a) of the Social Security Act, the receipts, revenues, disbursements, budget authority, and outlays of each off-budget Federal entity for a fiscal year shall be included in total budget authority, total budget outlays, and total revenues and the amounts of budget authority and outlays set forth for each major functional category, for such fiscal year. Amounts paid by the Federal Financing Bank for the purchase of loans made or guaranteed by a department, agency, or instrumentality of the Government of the United States shall be treated as outlays of such department, agency, or instrumentality.

"(7) The term 'maximum deficit amount' means—

"(A) with respect to the fiscal year beginning October 1, 1985, $171,900,000,000;

"(B) with respect to the fiscal year beginning October 1, 1986, $144,000,000,000;

"(C) with respect to the fiscal year beginning October 1, 1987, $108,000,000,000;

"(D) with respect to the fiscal year beginning October 1, 1988, $72,000,000,000;

"(E) with respect to the fiscal year beginning October 1, 1989, $36,000,000,000; and

"(F) with respect to the fiscal year beginning October 1, 1990, zero.

"(8) The term 'off-budget Federal entity' means any entity (other than a privately-owned Government-sponsored entity)—

"(A) which is established by Federal law, and

"(B) the receipts and disbursements of which are required by law to be excluded from the totals of—

"(i) the budget of the United States Government submitted by the President pursuant to section 1105 of title 31, United States Code, or

"(ii) the budget adopted by the Congress pursuant to title III of this Act.

"(9) The term 'entitlement authority' means spending authority described by section 401(c)(2)(C).

"(10) The term 'credit authority' means authority to incur direct loan obligations or to incur primary loan guarantee commitments.".

(2) Paragraph (2) of section 3 of the Congressional Budget and Impoundment Control Act of 1974 is amended by inserting before the comma the following: "or to collect offsetting receipts.".

(b) CONGRESSIONAL BUDGET PROCESS.—Title III of the Congressional Budget Act of 1974 is amended to read as follows:

"TITLE III—CONGRESSIONAL BUDGET PROCESS

"TIMETABLE

"SEC. 300. The timetable with respect to the congressional budget process for any fiscal year is as follows:

"On or before:	Action to be completed:
First Monday after January 3	President submits his budget.
February 15	Congressional Budget Office submits report to Budget Committees.
February 25	Committees submit views and estimates to Budget Committees.
April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

"ANNUAL ADOPTION OF CONCURRENT RESOLUTION ON THE BUDGET

"SEC. 301. (a) CONTENT OF CONCURRENT RESOLUTION ON THE BUDGET.—On or before April 15 of each year, the Congress shall complete action on a concurrent resolution on the budget for the fiscal year beginning on October 1 of such year. The concurrent resolution shall set forth appropriate levels for the fiscal year beginning on October 1 of such year, and planning levels for each of the two ensuing fiscal years, for the following—

"(1) totals of new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments;

"(2) total Federal revenues and the amount, if any, by which the aggregate level of Federal revenues should be increased or decreased by bills and resolutions to be reported by the appropriate committees;

"(3) the surplus or deficit in the budget;

"(4) new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments for each major functional category, based on allocations of the total levels set forth pursuant to paragraph (1); and

"(5) the public debt.

"(b) ADDITIONAL MATTERS IN CONCURRENT RESOLUTION.—The concurrent resolution on the budget may—

"(1) set forth, if required by subsection (f), the calendar year in which, in the opinion of the Congress, the goals for reducing unemployment set forth in section 4(b) of the Employment Act of 1946 should be achieved;

"(2) include reconciliation directives described in section 310;

"(3) require a procedure under which all or certain bills or resolutions providing new budget authority or new entitlement authority for such fiscal year shall not be enrolled until the Congress has completed action on any reconciliation bill or reconciliation resolution or both required by such concurrent resolution to be reported in accordance with section 310(b); and

"(4) set forth such other matters, and require such other procedures, relating to the budget, as may be appropriate to carry out the purposes of this Act.

"(c) CONSIDERATION OF PROCEDURES OR MATTERS WHICH HAVE THE EFFECT OF CHANGING ANY RULE OF THE HOUSE OF REPRESENTATIVES.—If the Committee on the Budget of the House of Representatives reports any concurrent resolution on the budget which includes any procedure or matter which has the effect of changing any rule of the House of Representatives, such concurrent resolution shall then be referred to the Committee on Rules with instructions to report it within five calendar days (not counting any day on which the House is not in session). The Committee on Rules shall have jurisdiction to report any concurrent resolution referred to it under this paragraph with an amendment or amendments changing or striking out any such procedure or matter.

"(d) VIEWS AND ESTIMATES OF OTHER COMMITTEES.—On or before February 25 of each year, each committee of the House of Representatives having legislative jurisdiction shall submit to the Committee on the Budget of the House and each committee of the Senate having legislative jurisdiction shall submit to the Committee on the Budget of the Senate its views and estimates (as determined by the committee making such submission) with respect to all matters set forth in subsections (a) and (b) which relate to matters within the jurisdiction or functions of such committee. The Joint Economic Committee shall submit to the Committees on the Budget of both Houses its recommendations as to the fiscal policy appropriate to the goals of the Employment Act of 1946. Any other committee of the House of Representatives or the Senate may submit to the Committee on the Budget of its House, and any joint committee of the Congress may submit to the Committees on the Budget of both Houses, its views and estimates with respect to all matters set forth in subsections (a) and (b) which relate to matters within its jurisdiction or functions.

"(e) HEARINGS AND REPORT.—In developing the concurrent resolution on the budget referred to in subsection (a) for each fiscal year, the Committee on the Budget of each House shall hold hearings and shall receive testimony from Members of Congress and such appropriate representatives of Federal departments and agencies, the

general public, and national organizations as the committee deems desirable. Each of the recommendations as to short-term and medium-term goals set forth in the report submitted by the members of the Joint Economic Committee under subsection (d) may be considered by the Committee on the Budget of each House as part of its consideration of such concurrent resolution, and its report may reflect its views thereon, including its views on how the estimates of revenues and levels of budget authority and outlays set forth in such concurrent resolution are designed to achieve any goals it is recommending. The report accompanying such concurrent resolution shall include, but not be limited to—

"(1) a comparison of revenues estimated by the committee with those estimated in the budget submitted by the President;

"(2) a comparison of the appropriate levels of total budget outlays and total new budget authority, total direct loan obligations, total primary loan guarantee commitments, as set forth in such concurrent resolution, with those estimated or requested in the budget submitted by the President;

"(3) with respect to each major functional category, an estimate of budget outlays and an appropriate level of new budget authority for all proposed programs and for all existing programs (including renewals thereof), with the estimate and level for existing programs being divided between permanent authority and funds provided in appropriation Acts, and with each such division being subdivided between controllable amounts and all other amounts;

"(4) an allocation of the level of Federal revenues recommended in the concurrent resolution among the major sources of such revenues;

"(5) the economic assumptions and objectives which underlie each of the matters set forth in such concurrent resolution and any alternative economic assumptions and objectives which the committee considered;

"(6) projections (not limited to the following), for the period of five fiscal years beginning with such fiscal year, of the estimated levels of total budget outlays and total new budget authority, the estimated revenues to be received, and the estimated surplus or deficit, if any, for each fiscal year in such period, and the estimated levels of tax expenditures (the tax expenditures budget) by major functional categories;

"(7) a statement of any significant changes in the proposed levels of Federal assistance to State and local governments;

"(8) information, data, and comparisons indicating the manner in which, and the basis on which, the committee determined each of the matters set forth in the concurrent resolution; and

"(9) allocations described in section 302(a).

"(f) Achievement of Goals for Reducing Unemployment.—

"(1) If, pursuant to section 4(c) of the Employment Act of 1946, the President recommends in the Economic Report that the goals for reducing unemployment set forth in section 4(b) of such Act be achieved in a year after the close of the five-year period prescribed by such subsection, the concurrent resolution on the budget for the fiscal year beginning after the date on which such Economic Report is received by the Congress may set forth the year in which, in the opinion of the Congress, such goals can be achieved.

"(2) After the Congress has expressed its opinion pursuant to paragraph (1) as to the year in which the goals for reducing unemployment set forth in section 4(b) of the Employment Act of 1946 can be achieved, if, pursuant to section 4(e) of such Act, the President recommends in the Economic Report that such goals be achieved in a year which is different from the year in which the Congress has expressed its opinion that such goals should be achieved, either in its action pursuant to paragraph (1) or in its most recent action pursuant to this paragraph, the concurrent resolution on the budget for the fiscal year beginning after the date on which such Economic Report is received by the Congress may set forth the year in which, in the opinion of the Congress, such goals can be achieved.

"(3) It shall be in order to amend the provision of such resolution setting forth such year only if the amendment thereto also proposes to alter the estimates, amounts, and levels (as described in subsection (a)) set forth in such resolution in germane fashion in order to be consistent with the economic goals (as described in sections 3(a)(2) and 4(b) of the Employment Act of 1946) which such amendment proposes can be achieved by the year specified in such amendment.

"(g) COMMON ECONOMIC ASSUMPTIONS.—The joint explanatory statement accompanying a conference report on a concurrent resolution on the budget shall set forth the common economic assumptions upon which such joint statement and conference report are based, or upon which any amendment contained in the joint explanatory statement to be proposed by the conferees in the case of technical disagreement is based.

"(h) BUDGET COMMITTEES CONSULTATION WITH COMMITTEES.—The Committee on the Budget of the House of Representatives shall consult with the committees of its House having legislative jurisdiction during the preparation, consideration, and enforcement of the concurrent resolution on the budget with respect to all matters which relate to the jurisdiction or functions of such committees.

"(i) MAXIMUM DEFICIT AMOUNT MAY NOT BE EXCEEDED.—

"(1)(A) Except as provided in paragraph (2), it shall not be in order in either the House of Representatives or the Senate to consider any concurrent resolution on the budget for a fiscal year under this section, or to consider any amendment to such a concurrent resolution, or to consider a conference report on such a concurrent resolution, if the level of total budget outlays for such fiscal year that is set forth in such concurrent resolution or conference report exceeds the recommended level of Federal revenues set forth for that year by an amount that is greater than the maximum deficit amount for such fiscal year as determined under section 3(7), or if the adoption of such amendment would result in a level of total budget outlays for that fiscal year which exceeds the recommended level of Federal revenues for that fiscal year, by an amount that is greater than the maximum deficit amount for such fiscal year as determined under section 3(7).

"(B) In the House of Representatives the point of order established under subparagraph (A) with respect to the consideration of a conference report or with respect to the consideration of a motion to concur, with or without an amendment or amendments, in a Senate amendment, the stage of disagreement having been reached, may be waived only by a vote of three-

fifths of the Members present and voting, a quorum being present.

"(2) Paragraph (1) of this subsection shall not apply if a declaration of war by the Congress is in effect.

"COMMITTEE ALLOCATIONS

"SEC. 302. (a) ALLOCATION OF TOTALS.—

"(1) For the House of Representatives, the joint explanatory statement accompanying a conference report on a concurrent resolution on the budget shall include an estimated allocation, based upon such concurrent resolution as recommended in such conference report, of the appropriate levels of total budget outlays, total new budget authority, total entitlement authority, and total credit authority among each committee of the House of Representatives which has jurisdiction over laws, bills and resolutions providing such new budget authority, such entitlement authority, or such credit authority. The allocation shall, for each committee, divide new budget authority, entitlement authority, and credit authority between amounts provided or required by law on the date of such conference report (mandatory or uncontrollable amounts), and amounts not so provided or required (discretionary or controllable amounts), and shall make the same division for estimated outlays that would result from such new budget authority.

"(2) For the Senate, the joint explanatory statement accompanying a conference report on a concurrent resolution on the budget shall include an estimated allocation, based upon such concurrent resolution as recommended in such conference report, of the appropriate levels of total budget outlays, total new budget authority and new credit authority among each committee of the House of Representatives and the Senate which has jurisdiction over bills and resolutions providing such new budget authority.

"(b) REPORTS BY COMMITTEES.—As soon as practicable after a concurrent resolution on the budget is agreed to—

"(1) the Committee on Appropriations of each House shall, after consulting with the Committee on Appropriations of the other House, (A) subdivide among its subcommittees the allocation of budget outlays, new budget authority, and new credit authority allocated to it in the joint explanatory statement accompanying the conference report on such concurrent resolution, and (B) further subdivide the amount with respect to each such subcommittee between controllable amounts and all other amounts; and

"(2) every other committee of the House and Senate to which an allocation was made in such joint explanatory statement shall, after consulting with the committee or committees of the other House to which all or part of its allocation was made, (A) subdivide such allocation among its subcommittees or among programs over which it has jurisdiction, and (B) further subdivide the amount with respect to each subcommittee or program between controllable amounts and all other amounts.

Each such committee shall promptly report to its House the subdivisions made by it pursuant to this subsection.

"(c) POINT OF ORDER.—It shall not be in order in the House of Representatives or the Senate to consider any bill or resolution, or amendment thereto, providing—

"(1) new budget authority for a fiscal year;

"(2) new spending authority as described in section 401(c)(2) for a fiscal year; or

"(3) new credit authority for a fiscal year;

within the jurisdiction of any committee which has received an appropriate allocation of such authority pursuant to subsection (a) for such fiscal year, unless and until such committee makes the allocation or subdivisions required by subsection (b), in connection with the most recently agreed to concurrent resolution on the budget for such fiscal year.

"(d) SUBSEQUENT CONCURRENT RESOLUTIONS.—In the case of a concurrent resolution on the budget referred to in section 304, the allocations under subsection (a) and the subdivisions under subsection (b) shall be required only to the extent necessary to take into account revisions made in the most recently agreed to concurrent resolution on the budget.

"(e) ALTERATION OF ALLOCATIONS.—At any time after a committee reports the allocations required to be made under subsection (b), such committee may report to its House an alteration of such allocations. Any alteration of such allocations must be consistent with any actions already taken by its House on legislation within the committee's jurisdiction.

"(f) LEGISLATION SUBJECT TO POINT OF ORDER.—

"(1) IN THE HOUSE OF REPRESENTATIVES.—After the Congress has completed action on a concurrent resolution on the budget for a fiscal year, it shall not be in order in the House of Representatives to consider any bill, resolution, or amendment providing new budget authority for such fiscal year, new entitlement authority effective during such fiscal year, or new credit authority for such fiscal year, or any conference report on any such bill or resolution, if—

"(A) the enactment of such bill or resolution as reported;

"(B) the adoption and enactment of such amendment; or

"(C) the enactment of such bill or resolution in the form recommended in such conference report,

would cause the appropriate allocation made pursuant to subsection (a) for such fiscal year of new discretionary budget authority, new entitlement authority, or new credit authority to be exceeded.

"(2) IN THE SENATE.—At any time after the Congress has completed action on the concurrent resolution on the budget required to be reported under section 301(a) for a fiscal year, it shall not be in order in the Senate to consider any bill or resolution (including a conference report thereon), or any amendment to a bill or resolution, that provides for budget outlays or new budget authority in excess of the appropriate allocation of such outlays or authority reported under subsection (b) in connection with the most recently agreed to concurrent resolution on the budget for such fiscal year.

"(g) DETERMINATIONS BY BUDGET COMMITTEES.—For purposes of this section, the levels of new budget authority, spending authority as described in section 401(c)(2), outlays, and new credit authority for a fiscal year shall be determined on the basis of estimates made

by the Committee on the Budget of the House of Representatives or the Senate, as the case may be.

"CONCURRENT RESOLUTION ON THE BUDGET MUST BE ADOPTED BEFORE LEGISLATION PROVIDING NEW BUDGET AUTHORITY, NEW SPENDING AUTHORITY, NEW CREDIT AUTHORITY, OR CHANGES IN REVENUES OR THE PUBLIC DEBT LIMIT IS CONSIDERED

"SEC. 303. (a) IN GENERAL.—It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution (or amendment thereto) as reported to the House or Senate which provides—

"(1) new budget authority for a fiscal year;

"(2) an increase or decrease in revenues to become effective during a fiscal year;

"(3) an increase or decrease in the public debt limit to become effective during a fiscal year;

"(4) new entitlement authority to become effective during a fiscal year; or

"(5) new credit authority for a fiscal year,

until the concurrent resolution on the budget for such fiscal year has been agreed to pursuant to section 301.

"(b) EXCEPTIONS.—Subsection (a) does not apply to any bill or resolution—

"(1) providing new budget authority which first becomes available in a fiscal year following the fiscal year to which the concurrent resolution applies; or

"(2) increasing or decreasing revenues which first become effective in a fiscal year following the fiscal year to which the concurrent resolution applies.

After May 15 of any calendar year, subsection (a) does not apply in the House of Representatives to any general appropriation bill, or amendment thereto, which provides new budget authority for the fiscal year beginning in such calendar year.

"(c) WAIVER IN THE SENATE.—

"(1) The committee of the Senate which reports any bill or resolution (or amendment thereto) to which subsection (a) applies may at or after the time it reports such bill or resolution (or amendment), report a resolution to the Senate (A) providing for the waiver of subsection (a) with respect to such bill or resolution (or amendment), and (B) stating the reasons why the waiver is necessary. The resolution shall then be referred to the Committee on the Budget of the Senate. That committee shall report the resolution to the Senate within 10 days after the resolution is referred to it (not counting any day on which the Senate is not in session) beginning with the day following the day on which it is so referred, accompanied by that committee's recommendations and reasons for such recommendations with respect to the resolution. If the committee does not report the resolution within such 10-day period, it shall automatically be discharged from further consideration of the resolution and the resolution shall be placed on the calendar.

"(2) During the consideration of any such resolution, debate shall be limited to one hour, to be equally divided between, and controlled by, the majority leader and minority leader or their designees, and the time on any debatable motion or appeal shall be limited to twenty minutes, to be equally divided between, and

controlled by, the mover and the manager of the resolution. In the event the manager of the resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. Such leaders, or either of them, may, from the time under their control on the passage of such resolution, allot additional time to any Senator during the consideration of any debatable motion or appeal. No amendment to the resolution is in order.

"(3) If, after the Committee on the Budget has reported (or been discharged from further consideration of) the resolution, the Senate agrees to the resolution, then subsection (a) shall not apply with respect to the bill or resolution (or amendment thereto) to which the resolution so agreed to applies.

"PERMISSIBLE REVISIONS OF CONCURRENT RESOLUTIONS ON THE BUDGET

"Sec. 304. (a) In General.—At any time after the concurrent resolution on the budget for a fiscal year has been agreed to pursuant to section 301, and before the end of such fiscal year, the two Houses may adopt a concurrent resolution on the budget which revises or reaffirms the concurrent resolution on the budget for such fiscal year most recently agreed to.

"(b) Maximum Deficit Amount May Not Be Exceeded.—The provisions of section 301(i) shall apply with respect to concurrent resolutions on the budget under this section (and amendments thereto and conference reports thereon) in the same way they apply to concurrent resolutions on the budget under such section 301(i) (and amendments thereto and conference reports thereon).

"PROVISIONS RELATING TO THE CONSIDERATION OF CONCURRENT RESOLUTIONS ON THE BUDGET

"Sec. 305. (a) Procedure in House of Representatives After Report of Committee; Debate.—

"(1) When the Committee on the Budget of the House of Representatives has reported any concurrent resolution on the budget, it is in order at any time after the fifth day (excluding Saturdays, Sundays, and legal holidays) following the day on which the report upon such resolution by the Committee on the Budget has been available to Members of the House and, if applicable, after the first day (excluding Saturdays, Sundays, and legal holidays) following the day on which a report upon such resolution by the Committee on Rules pursuant to section 301(c) has been available to Members of the House (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of the concurrent resolution. The motion is highly privileged and is not debatable. An amendment to the motion is not in order, and it is not in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

"(2) General debate on any concurrent resolution on the budget in the House of Representatives shall be limited to not more than 10 hours, which shall be divided equally between the majority and minority parties, plus such additional hours of debate as are consumed pursuant to paragraph (3). A motion further to limit debate is not debatable. A motion to recommit

the concurrent resolution is not in order, and it is not in order to move to reconsider the vote by which the concurrent resolution is agreed to or disagreed to.

"(3) Following the presentation of opening statements on the concurrent resolution on the budget for a fiscal year by the chairman and ranking minority member of the Committee on the Budget of the House, there shall be a period of up to four hours for debate on economic goals and policies.

"(4) Only if a concurrent resolution on the budget reported by the Committee on the Budget of the House sets forth the economic goals (as described in sections 3(a)(2) and 4(b) of the Full Employment Act of 1946) which the estimates, amounts, and levels (as described in section 301(a)) set forth in such resolution are designed to achieve, shall it be in order to offer to such resolution an amendment relating to such goals, and such amendment shall be in order only if it also proposes to alter such estimates, amounts, and levels in germane fashion in order to be consistent with the goals proposed in such amendment.

"(5) Consideration of any concurrent resolution on the budget by the House of Representatives shall be in the Committee of the Whole, and the resolution shall be considered for amendment under the five-minute rule in accordance with the applicable provisions of rule XXIII of the Rules of the House of Representatives. After the Committee rises and reports the resolution back to the House, the previous question shall be considered as ordered on the resolution and any amendments thereto to final passage without intervening motion; except that it shall be in order at any time prior to final passage (notwithstanding any other rule or provision of law) to adopt an amendment (or a series of amendments) changing any figure or figures in the resolution as so reported to the extent necessary to achieve mathematical consistency.

"(6) Debate in the House of Representatives on the conference report on any concurrent resolution on the budget shall be limited to not more than 5 hours, which shall be divided equally between the majority and minority parties. A motion further to limit debate is not debatable. A motion to recommit the conference report is not in order, and it is not in order to move to reconsider the vote by which the conference report is agreed to or disagreed to.

"(7) Appeals from decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to any concurrent resolution on the budget shall be decided without debate.

"(b) Procedure in Senate After Report of Committee; Debate; Amendments.—

"(1) Debate in the Senate on any concurrent resolution on the budget, and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than 50 hours, except that with respect to any concurrent resolution referred to in section 304(a) all such debate shall be limited to not more than 15 hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

"(2) Debate in the Senate on any amendment to a concurrent resolution on the budget shall be limited to 2 hours, to be equally divided between, and controlled by, the mover and the

manager of the concurrent resolution, and debate on any amendment to an amendment, debatable motion, or appeal shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution, except that in the event the manager of the concurrent resolution is in favor of any such amendment, motion, or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee. No amendment that is not germane to the provisions of such concurrent resolution shall be received. Such leaders, or either of them, may, from the time under their control on the passage of the concurrent resolution, allot additional time to any Senator during the consideration of any amendment, debatable motion, or appeal.

"(3) Following the presentation of opening statements on the concurrent resolution on the budget for a fiscal year by the chairman and ranking minority member of the Committee on the Budget of the Senate, there shall be a period of up to four hours for debate on economic goals and policies.

"(4) Subject to the other limitations of this Act, only if a concurrent resolution on the budget reported by the Committee on the Budget of the Senate sets forth the economic goals (as described in sections 3(a)(2) and 4(b) of the Employment Act of 1946) which the estimates, amounts, and levels (as described in section 301(a)) set forth in such resolution are designed to achieve, shall it be in order to offer to such resolution an amendment relating to such goals, and such amendment shall be in order only if it also proposes to alter such estimates, amounts, and levels in germane fashion in order to be consistent with the goals proposed in such amendment.

"(5) A motion to further limit debate is not debatable. A motion to recommit (except a motion to recommit with instructions to report back within a specified number of days, not to exceed 3, not counting any day on which the Senate is not in session) is not in order. Debate on any such motion to recommit shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the concurrent resolution.

"(6) Notwithstanding any other rule, an amendment or series of amendments to a concurrent resolution on the budget proposed in the Senate shall always be in order if such amendment or series of amendments proposes to change any figure or figures then contained in such concurrent resolution so as to make such concurrent resolution mathematically consistent or so as to maintain such consistency.

"(c) ACTION ON CONFERENCE REPORTS IN THE SENATE.—

"(1) The conference report on any concurrent resolution on the budget shall be in order in the Senate at any time after the third day (excluding Saturdays, Sundays, and legal holidays) following the day on which such conference report is reported and is available to Members of the Senate. A motion to proceed to the consideration of the conference report may be made even though a previous motion to the same effect has been disagreed to.

"(2) During the consideration in the Senate of the conference report on any concurrent resolution on the budget, debate shall be limited to 10 hours, to be equally divided between, and controlled by, the majority leader and minority leader or their

designees. Debate on any debatable motion or appeal related to the conference report shall be limited to 1 hour, to be equally divided between, and controlled by, the mover and the manager of the conference report.

"(3) Should the conference report be defeated, debate on any request for a new conference and the appointment of conferees shall be limited to 1 hour, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee, and should any motion be made to instruct the conferees before the conferees are named, debate on such motion shall be limited to one-half hour, to be equally divided between, and controlled by, the mover and the manager of the conference report. Debate on any amendment to any such instructions shall be limited to 20 minutes, to be equally divided between and controlled by the mover and the manager of the conference report. In all cases when the manager of the conference report is in favor of any motion, appeal, or amendment, the time in opposition shall be under the control of the minority leader or his designee.

"(4) In any case in which there are amendments in disagreement, time on each amendment shall be limited to 30 minutes, to be equally divided between, and controlled by, the manager of the conference report and the minority leader or his designee. No amendment that is not germane to the provisions of such amendments shall be received.

"(d) REQUIRED ACTION BY CONFERENCE COMMITTEE.—If at the end of 7 days (excluding Saturdays, Sundays, and legal holidays) after the conferees of both Houses have been appointed to a committee of conference on a concurrent resolution on the budget, the conferees are unable to reach agreement with respect to all matters in disagreement between the two Houses, then the conferees shall submit to their respective Houses, on the first day thereafter on which their House is in session—

"(1) a conference report recommending those matters on which they have agreed and reporting in disagreement those matters on which they have not agreed; or

"(2) a conference report in disagreement, if the matter in disagreement is an amendment which strikes out the entire text of the concurrent resolution and inserts a substitute text.

"(e) CONCURRENT RESOLUTION MUST BE CONSISTENT IN THE SENATE.—It shall not be in order in the Senate to vote on the question of agreeing to—

"(1) a concurrent resolution on the budget unless the figures then contained in such resolution are mathematically consistent; or

"(2) a conference report on a concurrent resolution on the budget unless the figures contained in such resolution, as recommended in such conference report, are mathematically consistent.

"LEGISLATION DEALING WITH CONGRESSIONAL BUDGET MUST BE HANDLED BY BUDGET COMMITTEES

"SEC. 306. No bill or resolution, and no amendment to any bill or resolution, dealing with any matter which is within the jurisdiction of the Committee on the Budget of either House shall be considered in that House unless it is a bill or resolution which has been

reported by the Committee on the Budget of that House (or from the consideration of which such committee has been discharged) or unless it is an amendment to such a bill or resolution.

"HOUSE COMMITTEE ACTION ON ALL APPROPRIATION BILLS TO BE COMPLETED BY JUNE 10

"SEC. 307. On or before June 10 of each year, the Committee on Appropriations of the House of Representatives shall report annual appropriation bills providing new budget authority under the jurisdiction of all of its subcommittees for the fiscal year which begins on October 1 of that year.

"REPORTS, SUMMARIES, AND PROJECTIONS OF CONGRESSIONAL BUDGET ACTIONS

"SEC. 308. (a) REPORTS ON LEGISLATION PROVIDING NEW BUDGET AUTHORITY, NEW SPENDING AUTHORITY, OR NEW CREDIT AUTHORITY, OR PROVIDING AN INCREASE OR DECREASE IN REVENUES OR TAX EXPENDITURES.—

"(1) Whenever a committee of either House reports to its House a bill or resolution, or committee amendment thereto, providing new budget authority (other than continuing appropriations), new spending authority described in section 401(c)(2), or new credit authority, or providing an increase or decrease in revenues or tax expenditures for a fiscal year, the report accompanying that bill or resolution shall contain a statement, or the committee shall make available such a statement in the case of an approved committee amendment which is not reported to its House, prepared after consultation with the Director of the Congressional Budget Office—

"(A) comparing the levels in such measure to the appropriate allocations in the reports submitted under section 302(b) for the most recently agreed to concurrent resolution on the budget for such fiscal year;

"(B) including an identification of any new spending authority described in section 401(c)(2) which is contained in such measure and a justification for the use of such financing method instead of annual appropriations;

"(C) containing a projection by the Congressional Budget Office of how such measure will affect the levels of such budget authority, budget outlays, spending authority, revenues, tax expenditures, direct loan obligations, or primary loan guarantee commitments under existing law for such fiscal year and each of the four ensuing fiscal years, if timely submitted before such report is filed; and

"(D) containing an estimate by the Congressional Budget Office of the level of new budget authority for assistance to State and local governments provided by such measure, if timely submitted before such report is filed.

"(2) Whenever a conference report is filed in either House and such conference report or any amendment reported in disagreement or any amendment contained in the joint statement of managers to be proposed by the conferees in the case of technical disagreement on such bill or resolution provides new budget authority (other than continuing appropriations), new spending authority described in section 401(c)(2), or new credit

authority, or provides an increase or decrease in revenues for a fiscal year, the statement of managers accompanying such conference report shall contain the information described in paragraph (1), if available on a timely basis. If such information is not available when the conference report is filed, the committee shall make such information available to Members as soon as practicable prior to the consideration of such conference report.

"(b) UP-TO-DATE TABULATIONS OF CONGRESSIONAL BUDGET ACTION.—

"(1) The Director of the Congressional Budget Office shall issue to the committees of the House of Representatives and the Senate reports on at least a monthly basis detailing and tabulating the progress of congressional action on bills and resolutions providing new budget authority, new spending authority described in section 401(c)(2), or new credit authority, or providing an increase or decrease in revenues or tax expenditures for a fiscal year. Such reports shall include but are not limited to an up-to-date tabulation comparing the appropriate aggregate and functional levels (including outlays) included in the most recently adopted concurrent resolution on the budget with the levels provided in bills and resolutions reported by committees or adopted by either House or by the Congress, and with the levels provided by law for the fiscal year preceding such fiscal year.

"(2) The Committee on the Budget of each House shall make available to Members of its House summary budget scorekeeping reports. Such reports—

"(A) shall be made available on at least a monthly basis, but in any case frequently enough to provide Members of each House an accurate representation of the current status of congressional consideration of the budget;

"(B) shall include, but are not limited to, summaries of tabulations provided under subsection (b)(1); and

"(C) shall be based on information provided under subsection (b)(1) without substantive revision.

The chairman of the Committee on the Budget of the House of Representatives shall submit such reports to the Speaker.

"(c) FIVE-YEAR PROJECTION OF CONGRESSIONAL BUDGET ACTION.—As soon as practicable after the beginning of each fiscal year, the Director of the Congressional Budget Office shall issue a report projecting for the period of 5 fiscal years beginning with such fiscal year—

"(1) total new budget authority and total budget outlays for each fiscal year in such period;

"(2) revenues to be received and the major sources thereof, and the surplus or deficit, if any, for each fiscal year in such period;

"(3) tax expenditures for each fiscal year in such period;

"(4) entitlement authority for each fiscal year in such period; and

"(5) credit authority for each fiscal year in such period.

"HOUSE APPROVAL OF REGULAR APPROPRIATION BILLS

"SEC. 309. It shall not be in order in the House of Representatives to consider any resolution providing for an adjournment period of more than three calendar days during the month of July until the

House of Representatives has approved annual appropriation bills providing new budget authority under the jurisdiction of all the subcommittees of the Committee on Appropriations for the fiscal year beginning on October 1 of such year. For purposes of this section, the chairman of the Committee on Appropriations of the House of Representatives shall periodically advise the Speaker as to changes in jurisdiction among its various subcommittees.

"RECONCILIATION

"SEC. 310. (a) INCLUSION OF RECONCILIATION DIRECTIVES IN CONCURRENT RESOLUTIONS ON THE BUDGET.—A concurrent resolution on the budget for any fiscal year, to the extent necessary to effectuate the provisions and requirements of such resolution, shall—

"(1) specify the total amount by which—

"(A) new budget authority for such fiscal year;

"(B) budget authority initially provided for prior fiscal years;

"(C) new entitlement authority which is to become effective during such fiscal year; and

"(D) credit authority for such fiscal year,

contained in laws, bills, and resolutions within the jurisdiction of a committee, is to be changed and direct that committee to determine and recommend changes to accomplish a change of such total amount;

"(2) specify the total amount by which revenues are to be changed and direct that the committees having jurisdiction to determine and recommend changes in the revenue laws, bills, and resolutions to accomplish a change of such total amount;

"(3) specify the amounts by which the statutory limit on the public debt is to be changed and direct the committee having jurisdiction to recommend such change; or

"(4) specify and direct any combination of the matters described in paragraphs (1), (2), and (3).

"(b) LEGISLATIVE PROCEDURE.—If a concurrent resolution containing directives to one or more committees to determine and recommend changes in laws, bills, or resolutions is agreed to in accordance with subsection (a), and—

"(1) only one committee of the House or the Senate is directed to determine and recommend changes, that committee shall promptly make such determination and recommendations and report to its House reconciliation legislation containing such recommendations; or

"(2) more than one committee of the House or the Senate is directed to determine and recommend changes, each such committee so directed shall promptly make such determination and recommendations and submit such recommendations to the Committee on the Budget of its House, which, upon receiving all such recommendations, shall report to its House reconciliation legislation carrying out all such recommendations without any substantive revision.

For purposes of this subsection, a reconciliation resolution is a concurrent resolution directing the Clerk of the House of Representatives or the Secretary of the Senate, as the case may be, to make specified changes in bills and resolutions which have not been enrolled.

"(c) COMPLIANCE WITH RECONCILIATION DIRECTIONS.—Any committee of the House of Representatives or the Senate that is directed, pursuant to a concurrent resolution on the budget, to determine and recommend changes of the type described in paragraphs (1) and (2) of subsection (a) with respect to laws within its jurisdiction, shall be deemed to have complied with such directions—

"(1) if—

"(A) the amount of the changes of the type described in paragraph (1) of such subsection recommended by such committee do not exceed or fall below the amount of the changes such committee was directed by such concurrent resolution to recommend under such paragraph by more than 20 percent of the total of the amounts of the changes such committee was directed to make under paragraphs (1) and (2) of such subsection, and

"(B) the amount of the changes of the type described in paragraph (2) of such subsection recommended by such committee do not exceed or fall below the amount of the changes such committee was directed by such concurrent resolution to recommend under that paragraph by more than 20 percent of the total of the amounts of the changes such committee was directed to make under paragraphs (1) and (2) of such subsection; and

"(2) if the total amount of the changes recommended by such committee is not less than the total of the amounts of the changes such committee was directed to make under paragraphs (1) and (2) of such subsection.

"(d) LIMITATION ON AMENDMENTS TO RECONCILIATION BILLS AND RESOLUTIONS.—

"(1) It shall not be in order in the House of Representatives to consider any amendment to a reconciliation bill or reconciliation resolution if such amendment would have the effect of increasing any specific budget outlays above the level of such outlays provided in the bill or resolution (for the fiscal years covered by the reconciliation instructions set forth in the most recently agreed to concurrent resolution on the budget), or would have the effect of reducing any specific Federal revenues below the level of such revenues provided in the bill or resolution (for such fiscal years), unless such amendment makes at least an equivalent reduction in other specific budget outlays, an equivalent increase in other specific Federal revenues, or an equivalent combination thereof (for such fiscal years), except that a motion to strike a provision providing new budget authority or new entitlement authority may be in order.

"(2) It shall not be in order in the Senate to consider any amendment to a reconciliation bill or reconciliation resolution if such amendment would have the effect of decreasing any specific budget outlay reductions below the level of such outlay reductions provided (for the fiscal years covered) in the reconciliation instructions which relate to such bill or resolution set forth in a resolution providing for reconciliation, or would have the effect of reducing Federal revenue increases below the level of such revenue increases provided (for such fiscal years) in such instructions relating to such bill or resolution, unless such amendment makes a reduction in other specific budget outlays, an increase in other specific Federal revenues, or a combination thereof (for such fiscal years) at least equivalent to

any increase in outlays or decrease in revenues provided by such amendment, except that a motion to strike a provision shall always be in order.

"(3) Paragraphs (1) and (2) shall not apply if a declaration of war by the Congress is in effect.

"(4) For purposes of this section, the levels of budget outlays and Federal revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the House of Representatives or of the Senate, as the case may be.

"(5) The Committee on Rules of the House of Representatives may make in order amendments to achieve changes specified by reconciliation directives contained in a concurrent resolution on the budget if a committee or committees of the House fail to submit recommended changes to its Committee on the Budget pursuant to its instruction.

"(e) PROCEDURE IN THE SENATE.—

"(1) Except as provided in paragraph (2), the provisions of section 305 for the consideration in the Senate of concurrent resolutions on the budget and conference reports thereon shall also apply to the consideration in the Senate of reconciliation bills reported under subsection (b) and conference reports thereon.

"(2) Debate in the Senate on any reconciliation bill reported under subsection (b), and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to not more than 20 hours.

"(f) COMPLETION OF RECONCILIATION PROCESS.—

"(1) IN GENERAL.—Congress shall complete action on any reconciliation bill or reconciliation resolution reported under subsection (b) not later than June 15 of each year.

"(2) POINT OF ORDER IN THE HOUSE OF REPRESENTATIVES.—It shall not be in order in the House of Representatives to consider any resolution providing for an adjournment period of more than three calendar days during the month of July until the House of Representatives has completed action on the reconciliation legislation for the fiscal year beginning on October 1 of the calendar year to which the adjournment resolution pertains, if reconciliation legislation is required to be reported by the concurrent resolution on the budget for such fiscal year.

"(g) LIMITATION ON CHANGES TO THE SOCIAL SECURITY ACT.—Notwithstanding any other provision of law, it shall not be in order in the Senate or the House of Representatives to consider any reconciliation bill or reconciliation resolution reported pursuant to a concurrent resolution on the budget agreed to under section 301 or 304, or a resolution pursuant to section 254(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, or any amendment thereto or conference report thereon, that contains recommendations with respect to the old-age, survivors, and disability insurance program established under title II of the Social Security Act.

"NEW BUDGET AUTHORITY, NEW SPENDING AUTHORITY, AND REVENUE LEGISLATION MUST BE WITHIN APPROPRIATE LEVELS

"SEC. 311. (a) LEGISLATION SUBJECT TO POINT OF ORDER.—Except as provided by subsection (b), after the Congress has completed action

on a concurrent resolution on the budget for a fiscal year, it shall not be in order in either the House of Representatives or the Senate to consider any bill, resolution, or amendment providing new budget authority for such fiscal year, providing new entitlement authority effective during such fiscal year, or reducing revenues for such fiscal year, or any conference report on any such bill or resolution, if—

"(1) the enactment of such bill or resolution as reported;

"(2) the adoption and enactment of such amendment; or

"(3) the enactment of such bill or resolution in the form recommended in such conference report;

would cause the appropriate level of total new budget authority or total budget outlays set forth in the most recently agreed to concurrent resolution on the budget for such fiscal year to be exceeded, or would cause revenues to be less than the appropriate level of total revenues set forth in such concurrent resolution or, in the Senate, would otherwise result in a deficit for such fiscal year that exceeds the maximum deficit amount specified for such fiscal year in section 3(7) (except to the extent that paragraph (1) of section 301(i) or section 304(b), as the case may be, does not apply by reason of paragraph (2) of such subsection).

"(b) EXCEPTION IN THE HOUSE OF REPRESENTATIVES.—Subsection (a) shall not apply in the House of Representatives to any bill, resolution, or amendment which provides new budget authority or new entitlement authority effective during such fiscal year, or to any conference report on any such bill or resolution, if—

"(1) the enactment of such bill or resolution as reported;

"(2) the adoption and enactment of such amendment; or

"(3) the enactment of such bill or resolution in the form recommended in such conference report,

would not cause the appropriate allocation of new discretionary budget authority or new entitlement authority made pursuant to section 302(a) for such fiscal year, for the committee within whose jurisdiction such bill, resolution, or amendment falls, to be exceeded.

"(c) DETERMINATION OF BUDGET LEVELS.—For purposes of this section, the levels of new budget authority, budget outlays, new entitlement authority, and revenues for a fiscal year shall be determined on the basis of estimates made by the Committee on the Budget of the House of Representatives or of the Senate, as the case may be.".

Subpart II—Amendments to Title IV of the Congressional Budget Act of 1974

SEC. 211. NEW SPENDING AUTHORITY.

Section 401 of the Congressional Budget Act of 1974 is amended to read as follows:

"BILLS PROVIDING NEW SPENDING AUTHORITY

"SEC. 401. (a) CONTROLS ON LEGISLATION PROVIDING SPENDING AUTHORITY.—It shall not be in order in either the House of Representatives or the Senate to consider any bill, resolution, or conference report, as reported to its House which provides new spending authority described in subsection (c)(2) (A) or (B) (or any amendment which provides such new spending authority), unless that bill, resolution, conference report, or amendment also provides

that such new spending authority as described in subsection (c)(2)(A) or (B) is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

"(b) LEGISLATION PROVIDING ENTITLEMENT AUTHORITY.—

"(1) It shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which provides new spending authority described in subsection (c)(2)(C) (or any amendment which provides such new spending authority) which is to become effective before the first day of the fiscal year which begins during the calendar year in which such bill or resolution is reported.

"(2) If any committee of the House of Representatives or the Senate reports any bill or resolution which provides new spending authority described in subsection (c)(2)(C) which is to become effective during a fiscal year and the amount of new budget authority which will be required for such fiscal year if such bill or resolution is enacted as so reported exceeds the appropriate allocation of new budget authority reported under section 302(b) in connection with the most recently agreed to concurrent resolution on the budget for such fiscal year, such bill or resolution shall then be referred to the Committee on Appropriations of that House with instructions to report it, with the committee's recommendations, within 15 calendar days (not counting any day on which that House is not in session) beginning with the day following the day on which it is so referred. If the Committee on Appropriations of either House fails to report a bill or resolution referred to it under this paragraph within such 15-day period, the committee shall automatically be discharged from further consideration of such bill or resolution and such bill or resolution shall be placed on the appropriate calendar.

"(3) The Committee on Appropriations of each House shall have jurisdiction to report any bill or resolution referred to it under paragraph (2) with an amendment which limits the total amount of new spending authority provided in such bill or resolution.

"(c) DEFINITIONS.—

"(1) For purposes of this section, the term 'new spending authority' means spending authority not provided by law on the effective date of this Act, including any increase in or addition to spending authority provided by law on such date.

"(2) For purposes of paragraph (1), the term 'spending authority' means authority (whether temporary or permanent)—

"(A) to enter into contracts under which the United States is obligated to make outlays, the budget authority for which is not provided in advance by appropriation Acts;

"(B) to incur indebtedness (other than indebtedness incurred under chapter 31 of title 31 of the United States Code) for the repayment of which the United States is liable, the budget authority for which is not provided in advance by appropriation Acts;

"(C) to make payments (including loans and grants), the budget authority for which is not provided for in advance by appropriation Acts, to any person or government if, under the provisions of the law containing such authority, the United States is obligated to make such payments to

persons or governments who meet the requirements established by such law;

"(D) to forego the collection by the United States of proprietary offsetting receipts, the budget authority for which is not provided in advance by appropriation Acts to offset such foregone receipts; and

"(E) to make payments by the United States (including loans, grants, and payments from revolving funds) other than those covered by subparagraph (A), (B), (C), or (D), the budget authority for which is not provided in advance by appropriation Acts.

Such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government.

"(d) EXCEPTIONS.—

"(1) Subsections (a) and (b) shall not apply to new spending authority if the budget authority for outlays which will result from such new spending authority is derived—

"(A) from a trust fund established by the Social Security Act (as in effect on the date of the enactment of this Act); or

"(B) from any other trust fund, 90 percent or more of the receipts of which consist or will consist of amounts (transferred from the general fund of the Treasury) equivalent to amounts of taxes (related to the purposes for which such outlays are or will be made) received in the Treasury under specified provisions of the Internal Revenue Code of 1954.

"(2) Subsections (a) and (b) shall not apply to new spending authority which is an amendment to or extension of the State and Local Fiscal Assistance Act of 1972, or a continuation of the program of fiscal assistance to State and local governments provided by that Act, to the extent so provided in the bill or resolution providing such authority.

"(3) Subsections (a) and (b) shall not apply to new spending authority to the extent that—

"(A) the outlays resulting therefrom are made by an organization which is (i) a mixed-ownership Government corporation (as defined in section 201 of the Government Corporation Control Act), or (ii) a wholly owned Government corporation (as defined in section 101 of such Act) which is specifically exempted by law from compliance with any or all of the provisions of that Act, as of the date of enactment of the Balanced Budget and Emergency Deficit Control Act of 1985; or

"(B) the outlays resulting therefrom consist exclusively of the proceeds of gifts or bequests made to the United States for a specific purpose.".

SEC. 212. CREDIT AUTHORITY.

Section 402 of the Congressional Budget Act of 1974 is amended to read as follows:

"LEGISLATION PROVIDING NEW CREDIT AUTHORITY

"SEC. 402. (a) CONTROLS ON LEGISLATION PROVIDING NEW CREDIT AUTHORITY.—It shall not be in order in either the House of Representatives or the Senate to consider any bill, resolution, or conference report, as reported to its House, or any amendment which

provides new credit authority described in subsection (b)(1), unless that bill, resolution, conference report, or amendment also provides that such new credit authority is to be effective for any fiscal year only to such extent or in such amounts as are provided in appropriation Acts.

"(b) DEFINITION.—For purposes of this Act, the term 'new credit authority' means credit authority (as defined in section 3(10) of this Act) not provided by law on the effective date of this section, including any increase in or addition to credit authority provided by law on such date.".

SEC. 213. DESCRIPTION BY CONGRESSIONAL BUDGET OFFICE.

(a) CONGRESSIONAL BUDGET OFFICE ANALYSIS.—Section 403(a) of the Congressional Budget Act of 1974 is amended by striking out "and" at the end of paragraph (2), by striking out the period and inserting "; and" at the end of paragraph (3), and by inserting at the end thereof the following new paragraph:

"(4) a description of each method for establishing a Federal financial commitment contained in such bill or resolution.".

(b) CONFORMING AMENDMENT.—The second sentence of section 403(a) of such Act is amended by striking out "estimates and comparison" and inserting in lieu thereof "estimates, comparison, and description".

SEC. 214. GENERAL ACCOUNTING OFFICE STUDY; OFF-BUDGET AGENCIES; MEMBER USER GROUP.

Title IV of the Congressional Budget Act of 1974 is amended by inserting at the end thereof the following new sections:

"STUDY BY THE GENERAL ACCOUNTING OFFICE OF FORMS OF FEDERAL FINANCIAL COMMITMENT THAT ARE NOT REVIEWED ANNUALLY BY CONGRESS

"SEC. 405. The General Accounting Office shall study those provisions of law which provide spending authority as described by section 401(c)(2) and which provide permanent appropriations, and report to the Congress its recommendations for the appropriate form of financing for activities or programs financed by such provisions not later than eighteen months after the effective date of this section. Such report shall be revised from time to time.

"OFF-BUDGET AGENCIES, PROGRAMS, AND ACTIVITIES

"SEC. 406. (a) Notwithstanding any other provision of law, budget authority, credit authority, and estimates of outlays and receipts for activities of the Federal budget which are off-budget immediately prior to the date of enactment of this section, not including activities of the Federal Old-Age and Survivors Insurance and Federal Disability Insurance Trust Funds, shall be included in a budget submitted pursuant to section 1105 of title 31, United States Code, and in a concurrent resolution on the budget reported pursuant to section 301 or section 304 of this Act and shall be considered, for purposes of this Act, budget authority, outlays, and spending authority in accordance with definitions set forth in this Act.

"(b) All receipts and disbursements of the Federal Financing Bank with respect to any obligations which are issued, sold, or guaranteed by a Federal agency shall be treated as a means of financing such

agency for purposes of section 1105 of title 31, United States Code, and for purposes of this Act.

"MEMBER USER GROUP

"SEC. 407. The Speaker of the House of Representatives, after consulting with the Minority Leader of the House, may appoint a Member User Group for the purpose of reviewing budgetary scorekeeping rules and practices of the House and advising the Speaker from time to time on the effect and impact of such rules and practices.".

Subpart III—Additional Provisions to Improve Budget Procedures

SEC. 221. CONGRESSIONAL BUDGET OFFICE.

(a) REPORTING DATE.—Section 202(f)(1) of the Congressional Budget Act of 1974 is amended by striking out "April 1" in the first sentence and inserting in lieu thereof "February 15".

(b) ADDITIONAL REPORTING REQUIREMENT.—Section 202(f) of such Act is further amended by adding at the end thereof the following new paragraph:

"(3) On or before January 15 of each year, the Director, after consultation with the appropriate committees of the House of Representatives and Senate, shall submit to the Congress a report listing (A) all programs and activities funded during the fiscal year ending September 30 of that calendar year for which authorizations for appropriations have not been enacted for that fiscal year, and (B) all programs and activities for which authorizations for appropriations have been enacted for the fiscal year ending September 30 of that calendar year, but for which no authorizations for appropriations have been enacted for the fiscal year beginning October 1 of that calendar year.".

(c) STUDIES.—Section 202 of such Act is further amended by adding at the end thereof the following new subsection:

"(h) STUDIES.—The Director shall conduct continuing studies to enhance comparisons of budget outlays, credit authority, and tax expenditures.".

SEC. 222. CURRENT SERVICES BUDGET FOR CONGRESSIONAL BUDGET PURPOSES.

(a) CURRENT SERVICES BUDGET.—The first sentence of section 1109(a) of title 31, United States Code, is amended by striking out "Before November 11 of each year" and inserting in lieu thereof "On or before the first Monday after January 3 of each year (on or before February 5 in 1986)".

(b) JOINT ECONOMIC COMMITTEE REVIEW.—Section 1109(b) of title 31, United States Code, is amended by striking out "January 1" and inserting in lieu thereof "March 1".

SEC. 223. STUDY OF OFF-BUDGET AGENCIES.

Section 606 of the Congressional Budget Act of 1974 is repealed

SEC. 224. CHANGES IN FUNCTIONAL CATEGORIES.

Section 1104(c) of title 31, United States Code, is amended by adding at the end thereof the following new sentence: "Committees

of the House of Representatives and Senate shall receive prompt notification of all such changes.".

SEC. 225. JURISDICTION OF COMMITTEE ON GOVERNMENT OPERATIONS.

Clause 1(j) of Rule X of the Rules of the House of Representatives is amended by inserting after item (5) the following new item:

"(6) Measures providing for off-budget treatment of Federal agencies or programs.".

SEC. 226. CONTINUING STUDY OF CONGRESSIONAL BUDGET PROCESS.

Clause 3 of Rule X of the Rules of the House of Representatives is amended by adding at the end thereof the following:

"(i) The Committee on Rules shall have the function of reviewing and studying, on a continuing basis, the congressional budget process, and the committee shall, from time to time, report its findings and recommendations to the House.".

SEC. 227. EARLY ELECTION OF COMMITTEES OF THE HOUSE.

Clause 6(a)(1) of Rule X of the Rules of the House of Representatives is amended by striking out "at" and inserting in lieu thereof "within the seventh calendar day beginning after", and by adding at the end thereof the following new sentence: "It shall always be in order to consider resolutions recommended by the respective party caucuses to change the composition of standing committees.".

SEC. 228. RESCISSIONS AND TRANSFERS IN APPROPRIATION BILLS.

(a) RESCISSIONS.—Clause 2(b) of Rule XXI of the Rules of the House of Representatives is amended by inserting before the period at the end thereof the following: ", and except rescissions of appropriations contained in appropriation Acts".

(b) TRANSFERS.—Clause 6 of Rule XXI of the Rules of the House of Representatives is amended by inserting before the period at the end thereof the following: ", and shall not apply to transfers of unexpended balances within the department or agency for which they were originally appropriated, reported by the Committee on Appropriations".

Subpart IV—Technical and Conforming Amendments

SEC. 231. TABLE OF CONTENTS.

The table of contents set forth in section 1(b) of the Congressional Budget and Impoundment Control Act of 1974 with respect to title III is amended to read as follows:

"TITLE III—CONGRESSIONAL BUDGET PROCESS

"Sec. 310. Reconciliation.
"Sec. 311. New budget authority, new spending authority, and revenue legislation must be within appropriate levels.".

SEC. 232. ADDITIONAL TECHNICAL AND CONFORMING AMENDMENTS.

(a) TABLE OF CONTENTS.—The table of contents set forth in section 1(b) of the Congressional Budget and Impoundment Control Act of 1974 is amended—

(1) by striking out the item relating to section 402 and inserting in lieu thereof the following new item:

"Sec. 402. Legislation providing new credit authority.";

(2) by inserting after the item relating to section 404 the following new items:

"Sec. 405. Study by the General Accounting Office of forms of Federal financial commitment that are not reviewed annually by Congress.
"Sec. 406. Off-budget agencies, programs, and activities.
"Sec. 407. Member user group."; and

(3) by striking out the item relating to section 606.

(b) TECHNICAL AMENDMENT.—Paragraph (4) of section 3 of the Congressional Budget and Impoundment Control Act of 1974 is amended—

(1) by adding "and" after the semicolon at the end of subparagraph (A);

(2) by striking out subparagraph (B); and

(3) by redesignating subparagraph (C) as subparagraph (B).

(c) TECHNICAL AMENDMENT.—Subparagraph (2) of clause 4(b) of rule X of the Rules of the House of Representatives is amended by striking out "first concurrent resolution" and inserting in lieu thereof "concurrent resolutions".

(d) TECHNICAL AMENDMENT.—Clause 4(g) of rule X of the Rules of the House of Representatives is amended by striking out "March 15" and inserting in lieu thereof "February 25".

(e) TECHNICAL AMENDMENT.—Clause 2(l)(1) of rule XI of the Rules of the House of Representatives is amended—

(1) by striking out "(except as provided in subdivision (C))" in subparagraph (A) thereof; and

(2) by repealing subparagraph (C) thereof.

(f) TECHNICAL AMENDMENT.—Clause 2(l)(3)(B) of rule XI of the Rules of the House of Representatives is amended by inserting "(1)" after "section 308(a)", and by striking out "new budget authority or new or increased tax expenditures" and inserting in lieu thereof "new budget authority (other than continuing appropriations), new spending authority described in section 401(c)(2) of such Act, new credit authority, or an increase or decrease in revenues or tax expenditures".

(g) TECHNICAL AMENDMENT.—Rule XLIX of the Rules of the House of Representatives is amended by striking out ", 304, or 310" in clause 1 and inserting in lieu thereof "or 304".

(h) TECHNICAL AMENDMENT.—Clause 1(e)(2) of Rule X of the Rules of the House of Representatives is amended by inserting before the period at the end thereof the following: ", and any resolution pursuant to section 254(b) of the Balanced Budget and Emergency Deficit Control Act of 1985.

PART B—BUDGET SUBMITTED BY THE PRESIDENT

SEC. 241. SUBMISSION OF PRESIDENT'S BUDGET; MAXIMUM DEFICIT AMOUNT MAY NOT BE EXCEEDED.

(a) SUBMISSION OF PRESIDENT'S BUDGET.—The first sentence of section 1105(a) of title 31, United States Code, is amended by striking out "During the first 15 days of each regular session of Congress" and inserting in lieu thereof the following: "On or before the first Monday after January 3 of each year (or on or before February 5 in 1986)".

(b) MAXIMUM DEFICIT AMOUNT MAY NOT BE EXCEEDED.—Section 1105 of title 31, United States Code, is amended by adding at the end thereof the following new subsection:

"(f)(1) The budget transmitted pursuant to subsection (a) for a fiscal year shall be prepared on the basis of the best estimates then available, in such a manner as to ensure that the deficit for such fiscal year shall not exceed the maximum deficit amount for such fiscal year as determined under paragraph (7) of section 3 of the Congressional Budget and Impoundment Control Act of 1974.

"(2) The deficit set forth in the budget so transmitted for any fiscal year shall not exceed the maximum deficit amount for such fiscal year as determined under paragraph (7) of section 3 of the Congressional Budget and Impoundment Control Act of 1974, with budget outlays and Federal revenues at such levels as the President may consider most desirable and feasible.

"(3) Paragraphs (1) and (2) shall not apply if a declaration of war by the Congress is in effect.".

SEC. 242. SUPPLEMENTAL BUDGET ESTIMATES AND CHANGES.

(a) CHANGE IN DATE OF SUBMISSION.—The first sentence of section 1106(b) of title 31, United States Code, is amended by striking out "April 11 and".

(b) REVISIONS AND SUPPLEMENTAL SUMMARIES.—Section 1106 of title 31 of such Code is further amended by adding at the end thereof the following new subsection:

"(c) Subsection (f) of section 1105 shall apply to revisions and supplemental summaries submitted under this section to the same extent that such subsection applies to the budget submitted under section 1105(a) to which such revisions and summaries relate.".

PART C—EMERGENCY POWERS TO ELIMINATE DEFICITS IN EXCESS OF MAXIMUM DEFICIT AMOUNT

SEC. 251. REPORTING OF EXCESS DEFICITS.

(a) INITIAL ESTIMATES, DETERMINATIONS, AND REPORT BY OMB AND CBO.—

(1) ESTIMATES AND DETERMINATIONS.—The Director of the Office of Management and Budget and the Director of the Congressional Budget Office (in this part referred to as the "Directors") shall with respect to each fiscal year—

(A) estimate the budget base levels of total revenues and budget outlays that may be anticipated for such fiscal year as of August 15 of the calendar year in which such fiscal

year begins (or as of January 10, 1986, in the case of the fiscal year 1986),

(B) determine whether the projected deficit for such fiscal year will exceed the maximum deficit amount for such fiscal year and whether such deficit excess will be greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), and

(C) estimate the rate of real economic growth that will occur during such fiscal year, the rate of real economic growth that will occur during each quarter of such fiscal year, and the rate of real economic growth that will have occurred during each of the last two quarters of the preceding fiscal year.

(2) Report.—The Directors jointly shall report to the Comptroller General on August 20 of the calendar year in which such fiscal year begins (or on January 15, 1986, in the case of the fiscal year 1986), estimating the budget base levels of total revenues and total budget outlays for such fiscal year, identifying the amount of any deficit excess for such fiscal year, stating whether such excess is greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), specifying the estimated rate of real economic growth for such fiscal year, for each quarter of such fiscal year, and for each of the last two quarters of the preceding fiscal year, indicating whether the estimate includes two or more consecutive quarters of negative real economic growth, and specifying (if the excess is greater than $10,000,000,000, or zero in the case of fiscal years 1986 and 1991), by account, for non-defense programs, and by account and programs, projects, and activities within each account, for defense programs, the base from which reductions are taken and the amounts and percentages by which such accounts must be reduced during such fiscal year, in accordance with the succeeding provisions of this part, in order to eliminate such excess.

(3) Determination of reductions.—The amounts and percentages by which such accounts must be reduced during a fiscal year shall be determined as follows:

(A)(i) If the deficit excess for the fiscal year is greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), such deficit excess shall be divided into halves.

(ii) In the case of fiscal year 1986, the amount of such excess—

(I) shall be multiplied by seven twelfths before being divided into halves in accordance with clause (i), and

(II) shall not exceed $11,700,000,000.

(B) Subject to the exemptions, exceptions, limitations, special rules, and definitions set forth in this section and in sections 255, 256, and 257, the reductions necessary to eliminate one-half of the deficit excess for the fiscal year (as adjusted under subparagraph (A)(ii) in the case of fiscal year 1986) shall be made in outlays under accounts within major functional category 050 (in this part referred to as outlays under "defense programs"), and the reductions necessary to eliminate the other half of the deficit excess (or the adjusted deficit excess, in the case of fiscal year 1986) shall be made in outlays under other accounts of the Federal Government (in this part referred to as outlays under "non-defense programs").

(C)(i) The total amount by which outlays for automatic spending increases scheduled to take effect during the fiscal year are to be reduced shall be determined in accordance with clause (ii) of this subparagraph.

(ii) Each such automatic spending increase shall be reduced—

(I) to zero (a uniform percentage reduction of 100 percent), or

(II) by a uniform percentage reduction of less than 100 percent calculated in a manner to reduce total outlays for the fiscal year by one-half of the deficit excess (or the adjusted deficit excess, in the case of fiscal year 1986), if the elimination of all such increases would reduce total outlays for the fiscal year by more than one-half of the deficit excess (or the adjusted deficit excess, in the case of fiscal year 1986) for the fiscal year.

(D) The total amount of the outlay reductions determined under subparagraph (C) shall be divided into two amounts:

(i) an amount equal to the outlay reductions attributable to programs specified in subparagraph (A) of section 257(l); and

(ii) an amount equal to the outlay reductions attributable to programs specified in subparagraph (B) of section 257(l).

(E)(i) For purposes of subparagraph (B), one-half of the amount of the reductions determined under clause (i) of subparagraph (D) shall be credited as reductions in outlays under defense programs, and the total amount of reductions in outlays under defense programs required under subparagraph (B) shall be reduced accordingly.

(ii) Sequestration of new budget authority and unobligated balances to achieve the remaining reductions in outlays under defense programs required under subparagraph (B) shall be determined as provided in subsection (d).

(F)(i) For purposes of subparagraph (B)—

(I) one-half of the amount of the reductions determined under clause (i) of subparagraph (D), and

(II) the amount of the reductions determined under clause (ii) of subparagraph (D),

shall be credited as reductions in outlays under non-defense programs, and the total amount of reductions in outlays under non-defense programs required under subparagraph (B) shall be reduced accordingly.

(ii) The maximum reduction permissible for each program to which an exception, limitation, or special rule set forth in subsection (c) or (f) of section 256 applies shall be determined, and the total amount of reductions in outlays under non-defense programs required under subparagraph (B) shall be reduced by the amount of the reduction determined with respect to each such program.

(iii)(I) Except as provided in subclause (II), the maximum reduction permissible for each of the programs to which the special rules set forth in sections 256(d) and 256(k) apply shall be determined, and the total amount of outlays under non-defense programs required under subparagraph (B)

shall be reduced by the amount of the maximum reductions so determined.

(II) If the maximum reduction determined in accordance with subclause (I) with respect to the programs to which that subclause relates would reduce outlays for such programs by an amount in excess of the remaining amount of the reduction in outlays in non-defense programs required under subparagraph (B), outlays for such programs shall instead be reduced proportionately by such lesser percentage as will achieve such remaining required reductions.

(iv)(I) Sequestrations and reductions under the remaining non-defense programs shall be applied on a uniform percentage basis so as to reduce new budget authority, new loan guarantee commitments, new direct loan obligations, obligation limitations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974 to the extent necessary to achieve any remaining required outlay reductions.

(II) For purposes of determining reductions under subclause (I), any reduction in outlays of the Commodity Credit Corporation under an order issued by the President under section 252 for a fiscal year, with respect to contracts entered into during that fiscal year, that will occur during the succeeding fiscal year, shall be credited as reductions in outlays for the fiscal year in which the order is issued.

The determination of which accounts are within major functional category 050 and which are not, for purposes of subparagraph (B), shall be made by the Directors in a manner consistent with the budget submitted by the President for the fiscal year 1986; except that for such purposes no part of the accounts entitled "Federal Emergency Management Agency, Salaries and expenses (58-0100-0-1-999)" and "Federal Emergency Management Agency, Emergency management planning and assistance (58-0101-0-1-999)" shall be treated as being within functional category 050.

(4) Additional specifications.—The report submitted under paragraph (2) must also specify (with respect to the fiscal year involved)—

(A) the amount of the automatic spending increase (if any) which is scheduled to take effect in the case of each program providing for such increases, the amount and percentage by which such increase is to be reduced, the amount by which the deficit excess (as adjusted under paragraph (3)(A)(ii), in the case of fiscal year 1986) will be reduced as a result of the elimination or reduction of automatic spending increases (stated separately for increases under programs listed in subparagraph (A) of section 257(1) and increases under programs listed in subparagraph (B) of that section), and the amount (if any) of each such increase, stated in terms of percentage points, which will take effect after reduction under this part;

(B) the amount of the savings (if any) to be achieved in the application of each of the special rules set forth in subsections (c) through (l) of section 256, along with a statement of (i) the new Federal matching rate resulting from the application of subsection (e) of that section, and (ii) the amount of the percentage reduction in payments to the

States under section 204 of the Federal-State Extended Unemployment Compensation Act of 1970; and

(C)(i) for defense programs, by account and by program, project, and activity within each account, the reduction (stated in terms of both percentage and amount) in new budget authority and unobligated balances, together with the estimated outlay reductions resulting therefrom; and

(ii) for non-defense programs, by account, the reduction, stated in terms of both percentage and amount, in new budget authority, new loan guarantee commitments, new direct loan obligations, obligation limitations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, together with the estimated outlay reductions resulting therefrom.

(5) BASIS FOR DIRECTORS' ESTIMATES, DETERMINATIONS, AND SPECIFICATIONS.—The estimates, determinations, and specifications of the Directors under the preceding provisions of this subsection and under subsection (c)(1) shall utilize the budget base, criteria, and guidelines set forth in paragraph (6) and in sections 255, 256, and 257. In the event that the Directors are unable to agree on any items required to be set forth in the report, they shall average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction. The report of the Directors shall also indicate the amount initially proposed for each averaged item by each Director.

(6) BUDGET BASE.—In computing the amounts and percentages by which accounts must be reduced during a fiscal year as set forth in any report required under this subsection for such fiscal year, the budget base shall be determined by—

(A) assuming (subject to subparagraph (C)) the continuation of current law in the case of revenues and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974;

(B) assuming, in the case of all accounts to which subparagraph (A) does not apply, appropriations equal to the prior year's appropriations except to the extent that annual appropriations or continuing appropriations for the entire fiscal year have been enacted;

(C) assuming that expiring provisions of law providing revenues and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974 do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates; and

(D) assuming (i) that Federal pay adjustments for statutory pay systems (I) will be as recommended by the President, but (II) will in no case result in a reduction in the levels of pay in effect immediately before such adjustments; and (ii) that medicare spending levels for inpatient hospital services will be based upon the regulations most recently issued in final form or proposed by the Health Care Financing Administration pursuant to sections 1886(b)(3)(B), 1886(d)(3)(A), and 1886(e)(4) of the Social Security Act.

Deferrals proposed under section 1013 of the Impoundment Control Act of 1974 during the period beginning October 1 of

such fiscal year (or the date of the enactment of this joint resolution in the case of fiscal year 1986) and ending with the date on which the final order is issued under section 252(b) for such fiscal year (or February 1, 1986, in the case of fiscal year 1986) shall not be taken into account in determining such budget base.

(b) Report to President and Congress by Comptroller General.—

(1) Report to be based on OMB-CBO report.—The Comptroller General shall review and consider the report issued by the Directors for the fiscal year and, with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein, shall issue a report to the President and the Congress on August 25 of the calendar year in which such fiscal year begins (or on January 20, 1986, in the case of the fiscal year 1986), estimating the budget base levels of total revenues and total budget outlays for such fiscal year, identifying the amount of any deficit excess for such fiscal year (adjusted in accordance with subsection (a)(3)(A)(ii), in the case of fiscal year 1986), stating whether such deficit excess (or adjusted deficit excess, in the case of fiscal year 1986) will be greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), specifying the estimated rate of real economic growth for such fiscal year, for each quarter of such fiscal year, and for each of the last two quarters of the preceding fiscal year, indicating whether the estimate includes two or more consecutive quarters of negative economic growth, and specifying (if the excess is greater than $10,000,000,000, or zero in the case of fiscal years 1986 and 1991), by account, for non-defense programs, and by account and programs, projects, and activities within each account, for defense programs, the base from which reductions are taken and the amounts and percentages by which such accounts must be reduced during such fiscal year in order to eliminate such deficit excess (or adjusted deficit excess, in the case of fiscal year 1986). Such report shall be based on the estimates, determinations, and specifications of the Directors and shall utilize the budget base, criteria, and guidelines set forth in subsection (a)(6) and in sections 255, 256, and 257.

(2) Contents of report.—The report of the Comptroller General under this subsection shall—

(A) provide for the determination of reductions in the manner specified in subsection (a)(3); and

(B) contain estimates, determinations, and specifications for all of the items contained in the report submitted by the Directors under subsection (a).

Such report shall explain fully any differences between the contents of such report and the report of the Directors.

(c) Revised Estimates, Determinations, and Reports.—

(1) Report by OMB and CBO.—On October 5 of the fiscal year (except in the case of the fiscal year 1986), the Directors shall submit to the Comptroller General a revised report—

(A) indicating whether and to what extent, as a result of laws enacted and regulations promulgated after the submission of their initial report under subsection (a), the excess deficit (adjusted in accordance with subsection (a)(3)(A)(ii), in the case of fiscal year 1986) identified in the report

submitted under such subsection has been eliminated, reduced, or increased, and

(B) adjusting the determinations made under subsection (a) to the extent necessary.

The revised report submitted under this paragraph shall contain estimates, determinations, and specifications for all of the items contained in the initial report and authorized under subsection (d)(3)(D)(i) and shall be based on the same economic and technical assumptions, employ the same methodologies, and utilize the same definition of the budget base and the same criteria and guidelines as those used in the report submitted by the Directors under subsection (a) (except that subdivision (II) of paragraph (6)(D)(i) of such subsection shall not apply), and shall provide for the determination of reductions in the manner specified in subsection (a)(3).

(2) REPORT BY COMPTROLLER GENERAL.—

(A) On October 10 of the fiscal year (except in the case of the fiscal year 1986), the Comptroller General shall submit to the President and the Congress a report revising the report submitted by the Comptroller General under subsection (b), adjusting the estimates, determinations, and specifications contained in that report to the extent necessary in the light of the revised report submitted to him by the Directors under paragraph (1) of this subsection.

(B) The revised report of the Comptroller General under this paragraph shall provide for the determination of reductions as specified in subsection (a)(3) and shall contain all of the estimates, determinations, and specifications required (in the case of the report submitted under subsection (b)) pursuant to subsection (b)(2)(B).

(d) SEQUESTRATION OF DEFENSE PROGRAMS.—

(1) DETERMINATION OF UNIFORM PERCENTAGE.—The total amount of reductions in outlays under defense programs required for a fiscal year under subsection (a)(3)(B) after the reduction under subsection (a)(3)(E)(i) shall be calculated as a percentage of the total amount of outlays for the fiscal year estimated to result from new budget authority and unobligated balances for defense programs.

(2) SEQUESTRATION OF NEW BUDGET AUTHORITY AND UNOBLIGATED BALANCES.—

(A) Sequestration to achieve the remaining reduction in outlays under defense programs shall be made by reducing new budget authority and unobligated balances (if any) in each program, project, or activity under accounts within defense programs by the percentage determined under paragraph (1), computed on the basis of the combined outlay rate for new budget authority and unobligated balances for such program, project, or activity determined under subparagraph (B).

(B)(i) The combined outlay rate for new budget authority and unobligated balances for a program, project, or activity shall be determined by the Directors from data then available to them as supplemented by additional data from the heads of the appropriate departments or agencies of the executive branch. If the outlay rate for unobligated balances is not available for any program, project, or activity,

the outlay rate used shall be the outlay rate for new budget authority.

(ii) The weighted average (by budget authority) for the combined outlay rates so determined for all the programs, projects, and activities within an account shall be compared to the historical outlay rates for that account previously estimated by the Directors. If the Directors determine that it is necessary to make the combined outlay rate for a program, project, or activity as determined under the first sentence of this subparagraph consistent with the historical rates for such account, they may adjust the outlay rate for such program, project, or activity.

(C) For purposes of this paragraph:

(i) The term "outlay rate", with respect to any program, project, or activity, means—

(I) the ratio of outlays resulting in the fiscal year involved from new budget authority for such program, project, or activity to such new budget authority; or

(II) the ratio of outlays resulting in the fiscal year involved from unobligated balances for such program, project, or activity to such unobligated balances.

(ii) The term "combined outlay rate", with respect to any program, project, or activity, means the weighted average (by budget authority) of the ratios determined under subclauses (I) and (II) of clause (i) for such program, project, or activity.

(3) SEQUESTRATION FROM NATIONAL DEFENSE ACCOUNTS THROUGH TERMINATION OR MODIFICATION OF EXISTING CONTRACTS.—

(A)(i) Subject to the provisions of this paragraph, the President, with respect to any fiscal year, may provide for—

(I) the termination or modification of an existing contract within any program, project, or activity within a account within major functional category 050; and

(II) the crediting, to the amount of new budget authority and unobligated balances otherwise required to be reduced from such program, project, or activity, of the net reduction achieved for the appropriate fiscal year by such termination or modification, based upon the combined outlay rate for such program, project, or activity determined under paragraph (2)(B).

(ii) The remaining required outlay reductions in such program, project, or activity shall be achieved by sequestering new budget authority and unobligated balances based upon the combined outlay rate for such program, project, or activity determined under paragraph (2)(B).

(B) Not later than September 5 of the calendar year in which the fiscal year begins (January 15 in the case of fiscal year 1986), the President shall transmit to the Comptroller General and the Committees on Armed Services and on Appropriations of the Senate and House of Representatives and make available to the Directors a report concerning the contracts proposed to be terminated or modified under this paragraph for such fiscal year. The report shall—

(i) identify the contracts proposed to be terminated or modified and the proposed date of termination or modification of each such contract;

(ii) identify the anticipated outlay savings for the fiscal year involved and the anticipated reduction in obligated balances with respect to each such proposed termination or modification, together with an explanation of the relationship between the obligated balances that could be cancelled and the estimated outlay savings resulting therefrom;

(iii) provide documentation of the anticipated savings in outlays and obligated balances; and

(iv) provide a complete rationale for the effect of each proposed termination or modification on the contract concerned and on the program, project, or activity involved.

(C) Not later than September 30 of the calendar year in which the fiscal year begins (February 15 in the case of fiscal year 1986), the Comptroller General shall certify to the President and the Congress, with respect to each contract which is proposed to be terminated or modified—

(i) whether the Comptroller General is able to verify that the estimated outlay savings for the fiscal year involved are achievable and would be achieved in that year; and

(ii) whether the ratio between the projected outlay savings and the anticipated reduction in obligated balances is reasonable.

(D)(i) In the case of a fiscal year other than fiscal year 1986, each proposed contract termination or modification described in subparagraph (A) with respect to which the certification by the Comptroller General under subparagraph (C) is affirmative (with respect to both clause (i) and clause (ii) of such subparagraph) shall be included in the report of the Directors under subsection (c)(1). The report shall include the information about each such contract described in subparagraph (B)(ii).

(ii) In the case of fiscal year 1986, each proposed contract termination or modification described in subparagraph (A) with respect to which the certification by the Comptroller General under subparagraph (C) is affirmative (with respect to both clause (i) and (ii) of such subparagraph) shall be included in the modification authorized by section 252(a)(6)(D)(iii) in the order issued by the President under section 252(a)(1) with respect to fiscal year 1986.

(iii) The authority of the President described in subparagraph (A) is not effective in the case of any proposed contract termination or modification with respect to which the certification by the Comptroller General under subparagraph (C) is not affirmative (with respect to both clause (i) and clause (ii) of such subparagraph).

(E) For any contract termination or modification proposed pursuant to this paragraph, the President shall certify to Congress, within thirty days after the effective date of the contract termination or modification, that the amounts proposed for deobligation under such contract have in fact been deobligated and cancelled.

(e) DATES FOR SUBMISSION OF REPORTS AND ISSUANCE OF ORDERS.—If the date specified for the submission of a report by the Directors or the Comptroller General under this section or for the issuance of an order by the President under section 252 falls on a Sunday or legal holiday, such report shall be submitted or such order issued on the following day.

(f) PRINTING OF REPORTS.—Each report submitted under this section shall be printed in the Federal Register on the date it is issued; and the reports of the Comptroller General submitted to the Congress under subsections (b) and (c)(2) shall be printed as documents of the House of Representatives and the Senate.

(g) EXCEPTION.—The preceding provisions of this section shall not apply if a declaration of war by the Congress is in effect.

SEC. 252. PRESIDENTIAL ORDER.

(a) ISSUANCE OF INITIAL ORDER.—

(1) IN GENERAL.—On September 1 following the submission of a report by the Comptroller General under section 251(b) which identifies an amount greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991) by which the deficit for a fiscal year will exceed the maximum deficit amount for such fiscal year (or on February 1, 1986, in the case of the fiscal year 1986), the President, in strict accordance with the requirements of paragraph (3) and section 251(a)(3) and (4) and subject to the exemptions, exceptions, limitations, special rules, and definitions set forth in sections 255, 256, and 257, shall eliminate the full amount of the deficit excess (as adjusted by the Comptroller General in such report in accordance with section 251(a)(3)(A)(ii), in the case of fiscal year 1986) by issuing an order that (notwithstanding the Impoundment Control Act of 1974)—

(A) modifies or suspends the operation of each provision of Federal law that would (but for such order) require an automatic spending increase to take effect during such fiscal year, in such a manner as to prevent such increase from taking effect, or reduce such increase, in accordance with such report; and

(B) eliminates the remainder of such deficit excess (or adjusted deficit excess, in the case of fiscal year 1986) by sequestering new budget authority, unobligated balances, new loan guarantee commitments, new direct loan obligations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, and reducing obligation limitations, in accordance with such report—

(i) for funds provided in annual appropriation Acts, from each affected program, project, and activity (as set forth in the most recently enacted applicable appropriation Acts and accompanying committee reports for the program, project, or activity involved, including joint resolutions providing continuing appropriations and committee reports accompanying Acts referred to in such resolutions), applying the same reduction percentage as the percentage by which the account involved is reduced in the report submitted under section 251(b), or from each affected budget account if the program, project, or activity is not so set forth, and

(ii) for funds not provided in annual appropriation Acts, from each budget account activity as identified in

the program and financing schedules contained in the appendix to the Budget of the United States Government for that fiscal year, applying the same reduction percentage as the percentage by which the account is reduced in such report.

(2) SPECIAL SEQUESTRATION PROCEDURES FOR NATIONAL DEFENSE FOR FISCAL YEAR 1986.—

(A) IN GENERAL.—Notwithstanding subparagraph (B)(i) of paragraph (1), the order issued by the President under paragraph (1) with respect to fiscal year 1986 shall sequester, from each program, project, or activity within an account within major functional category 050, such amounts of new budget authority and unobligated balances as are specified (in accordance with section 251(a)(3)(E)(ii)) in the report submitted by the Comptroller General under section 251(b).

(B) FLEXIBILITY WITH RESPECT TO MILITARY PERSONNEL ACCOUNTS.—

(i) Notwithstanding subparagraph (B)(i) of paragraph (1), the order issued by the President under paragraph (1) with respect to fiscal year 1986 may, with respect to any military personnel account—

(I) exempt any program, project, or activity within such account from the order;

(II) provide for a lower uniform percentage to be applied to reduce any program, project, or activity within such account than would otherwise apply; or

(III) take actions described in both subclauses (I) and (II).

(ii) If the President uses the authority under clause (i), the total amount by which outlays are not reduced for fiscal year 1986 in military personnel accounts by reason of the use of such authority shall be determined. Reductions in outlays under defense programs in such total amount shall be achieved by a uniform percentage sequestration of new budget authority and unobligated balances in each program, project, and activity within each account within major functional category 050 other than those military personnel accounts for which the authority provided under clause (i) has been exercised, computed on the basis of the outlay rate for each such program, project, and activity determined under section 251(d).

(iii) The President may not use the authority provided by clause (i) unless he notifies the Comptroller General and the Congress on or before January 10, 1986, of the manner in which such authority will be exercised.

(C) FLEXIBILITY AMONG PROGRAMS, PROJECTS, AND ACTIVITIES WITHIN ACCOUNTS.—

(i) New budget authority and unobligated balances for any program, project, or activity within an account within major functional category 050 may be reduced under an order issued by the President under paragraph (1) for fiscal year 1986, subject to clauses (ii) and (iii) of this subparagraph, by up to two times the

percentage otherwise applicable to the program, project, or activity (determined after any reduction under subparagraph (B)). To the extent such reductions are made under such an order, the President may provide in the order for an increase in new budget authority and unobligated balances for another program, project, or activity within the same account within major functional category 050 for fiscal year 1986, but such program, project, or activity may not be increased above the level in the base set forth in such order.

(ii) No order issued by the President under paragraph (1) for fiscal year 1986 may result in a base closure or realignment that would otherwise be subject to section 2687 of title 10, United States Code.

(iii) New budget authority and unobligated balances for any program, project, or activity within major functional category 050 for fiscal year 1986 which is 10 percent (or more) greater than the amount requested in the budget submitted by the President under section 1105 of title 31, United States Code, for fiscal year 1986 may not be reduced by more than the percentage applicable to the program, project, or activity (determined after any reduction under subparagraph (B)).

(3) Order to be based on Comptroller General's report.—The order must provide for reductions in the manner specified in section 251(a)(3), must incorporate the provisions of the report submitted under section 251(b), and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account, with the exception of the authority granted to the President for fiscal year 1986 with respect to defense programs pursuant to paragraph (2)(C).

(4) Effect of sequestration under initial order.—Notwithstanding section 257(7), amounts sequestered under an order issued by the President under paragraph (1) for fiscal year 1987 or any subsequent fiscal year shall be withheld from obligation pending the issuance of a final order under subsection (b) and shall be permanently cancelled in accordance with such final order upon the issuance of such order.

(5) Accompanying message.—At the time the actions described in the preceding provisions of this subsection with respect to any fiscal year are taken, the President shall transmit to both Houses of the Congress a message containing all the information required by section 251(a)(4) and further specifying in strict accordance with paragraph (3)—

(A) within each account, for each program, project, and activity, or budget account activity, the base from which each sequestration or reduction is taken and the amounts which are to be sequestered or reduced for each such program, project, and activity or budget account activity; and

(B) such other supporting details as the President may determine to be appropriate.

Upon receipt in the Senate and the House of Representatives, the message (and any accompanying proposals made under subsection (c)) shall be referred to all committees with jurisdiction over programs, projects, and activities affected by the order.

(6) EFFECTIVE DATE OF INITIAL ORDER.—

(A) FISCAL YEAR 1986.—The order issued by the President under paragraph (1) with respect to the fiscal year 1986 shall be effective as of March 1, 1986.

(B) FISCAL YEARS 1987-1991.—The order issued by the President under paragraph (1) with respect to the fiscal year 1987 or any subsequent fiscal year shall be effective as of October 1 of such fiscal year (and the President shall withhold from obligation as provided in paragraph (4), pending the issuance of his final order under subsection (b), any amounts that are to be sequestered or reduced under such order).

(C) TREATMENT OF AUTOMATIC SPENDING INCREASES.—

(i) FISCAL YEAR 1986.—Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be first paid during the period beginning with the date of the enactment of this joint resolution and ending with the effective date of an order issued by the President under paragraph (1) for the fiscal year 1986 shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during such fiscal year, the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled. If such order provides for the payment of automatic spending increases during such fiscal year in amounts that are less than would have been paid but for such order, or provides for the payment of the full amount of such increases, the increases suspended pursuant to such sentence shall be restored to the extent necessary to pay such reduced or full increases, and lump-sum payments in the amounts necessary to pay such reduced or full increases shall be made, for the period for which such increases were suspended pursuant to this clause.

(ii) FISCAL YEARS 1987-1991.—Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be first paid during the period beginning with the first day of such fiscal year and ending with the date on which a final order is issued pursuant to subsection (b) shall be suspended until such final order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such final order provides that automatic spending increases shall be reduced to zero during such fiscal year, the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled. If such final order provides for the payment of automatic spending increases

during such fiscal year in amounts that are less than would have been paid but for such final order, or provides for the payment of the full amount of such increases, the increases suspended pursuant to such sentence shall be restored to the extent necessary to pay such reduced or full increases, and lump-sum payments in the amounts necessary to pay such reduced or full increases shall be made, for the period for which such increases were suspended pursuant to this clause.

(iii) PROHIBITION AGAINST RECOUPMENT.—Notwithstanding clauses (i) and (ii), if an amount required by either such clause to be withheld is paid, no recoupment shall be made against an individual to whom payment was made.

(iv) EFFECT OF LUMP-SUM PAYMENTS ON NEEDS-RELATED PROGRAMS.—Lump-sum payments made under the last sentence of clause (i) or clause (ii) shall not be considered as income or resources or otherwise taken into account in determining the eligibility of any individual for aid, assistance, or benefits under any Federal or federally-assisted program which conditions such eligibility to any extent upon the income or resources of such individual or his or her family or household, or in determining the amount or duration of such aid, assistance, or benefits.

(D) SPECIAL RULES FOR FISCAL YEAR 1986.—(i) For purposes of applying this section and section 251 with respect to the fiscal year 1986—

(I) the order issued by the President under paragraph (1) of this subsection shall be considered the final order of the President under this section; and

(II) the Committees on Appropriations of the House of Representatives and the Senate may, after consultation with each other, define the term "program, project, and activity", and report to their respective Houses, with respect to matters within their jurisdiction, and the order issued by the President shall sequester funds in accordance with such definition.

(ii) If the Comptroller General declares in the report issued under section 251(b) for fiscal year 1986 that as a result of laws enacted and regulations promulgated after the date of the enactment of this joint resolution and prior to the issuance of such report the excess deficit for the fiscal year (adjusted in accordance with section 251(a)(3)(A)(ii) has been eliminated, the order issued under this subsection for the fiscal year shall so state (and shall make available for obligation and expenditure any amounts withheld pursuant to subparagraph (C)(i) of this paragraph).

(iii) The order issued by the President under paragraph (1) with respect to fiscal year 1986 shall be modified before the effective date for such order prescribed under subparagraph (A) to include in the order the changes in budget authority and unobligated balances, and related changes in outlay reductions, authorized for such fiscal year under section 251(d)(3)(D)(ii).

(b) ISSUANCE OF FINAL ORDER.—

(1) IN GENERAL.—On October 15 of the fiscal year (except in the case of the fiscal year 1986), after the submission of the revised report submitted by the Comptroller General under section 251(c)(2), the President shall issue a final order under this section to eliminate the full amount of the deficit excess as identified by the Comptroller General in the revised report submitted under section 251(c)(2) but only to the extent and in the manner provided in such report. The order issued under this subsection—

(A) shall include the same reductions and sequestrations as the initial order issued under subsection (a), adjusted to the extent necessary to take account of any changes in relevant amounts or percentages determined by the Comptroller General in the revised report submitted under section 251(c)(2),

(B) shall make such reductions and sequestrations in strict accordance with the requirements of section 251(a)(3) and (4), and

(C) shall utilize the same criteria and guidelines as those which were used in the issuance of such initial order under subsection (a).

The provisions of subsection (a)(3) shall apply to the revised report submitted under section 251(c)(2) and to the order issued under this subsection in the same manner as such provisions apply to the initial report issued under section 251(b) and to the order issued under subsection (a).

(2) ORDER REQUIRED IF EXCESS DEFICIT IS ELIMINATED.—If the Comptroller General issues a revised report under section 251(c)(2) stating that as a result of laws enacted and regulations promulgated after the submission of the initial report of the Comptroller General under section 251(b) the excess deficit for a fiscal year (adjusted in accordance with section 251(a)(3)(A)(ii), in the case of fiscal year 1986) has been eliminated, the order issued under this subsection shall so state and shall make available for obligation and expenditure any amounts withheld pursuant to subsection (a)(4) or (a)(6)(C).

(3) EFFECTIVE DATE OF FINAL ORDER.—

(A) Except as provided in subsection (a)(6)(A), the final order issued by the President under paragraph (1) shall become effective on the date of its issuance, and shall supersede the order issued under subsection (a)(1).

(B) Any modification or suspension by such order of the operation of a provision of law that would (but for such order) require an automatic spending increase to take effect during the fiscal year shall apply for the one-year period beginning with the date on which such automatic increase would have taken effect during such fiscal year (but for such order).

(c) PROPOSAL OF ALTERNATIVES BY THE PRESIDENT.—A message transmitted pursuant to subsection (a)(5) with respect to a fiscal year may be accompanied by a proposal setting forth in full detail alternative ways to reduce the deficit for such fiscal year to an amount not greater than the maximum deficit amount for such fiscal year.

(d) EXISTING PROGRAMS, PROJECTS, AND ACTIVITIES NOT TO BE ELIMINATED.—No action taken by the President under subsection (a)

or (b) of this section shall have the effect of eliminating any program, project, or activity of the Federal Government.

(e) RELATIVE BUDGET PRIORITIES NOT TO BE ALTERED.—Nothing in the preceding provisions of this section shall be construed to give the President new authority to alter the relative priorities in the Federal budget that are established by law, and no person who is or becomes eligible for benefits under any provision of law shall be denied eligibility by reason of any order issued under this part.

SEC. 253. COMPLIANCE REPORT BY COMPTROLLER GENERAL.

On or before November 15 of each fiscal year (or on or before April 1, 1986, in the case of the fiscal year 1986), the Comptroller General shall submit to the Congress and the President a report on the extent to which the President's order issued under section 252(b) for such fiscal year complies with all of the requirements contained in section 252, either certifying that the order fully and accurately complies with such requirements or indicating the respects in which it does not.

SEC. 254. CONGRESSIONAL ACTION.

(a) SPECIAL PROCEDURES IN THE EVENT OF A RECESSION.—

(1) IN GENERAL.—The Director of the Congressional Budget Office shall notify the Congress at any time if—

(A) during the period consisting of the quarter during which such notification is given, the quarter preceding such notification, and the four quarters following such notification, such Office or the Office of Management and Budget has determined that real economic growth is projected or estimated to be less than zero with respect to each of any two consecutive quarters within such period, or

(B) the Department of Commerce preliminary reports of actual real economic growth (or any subsequent revision thereof) indicate that the rate of real economic growth for each of the most recent reported quarter and the immediately preceding quarter is less than one percent.

Upon such notification the Majority Leader of each House shall introduce a joint resolution (in the form set forth in paragraph (2)) declaring that the conditions specified in this paragraph are met and suspending the relevant provisions of this title for the remainder of the current fiscal year or for the following fiscal year or both.

(2) FORM OF JOINT RESOLUTION.—

(A) The matter after the resolving clause in any joint resolution introduced pursuant to paragraph (1) shall be as follows: "That the Congress declares that the conditions specified in section 254(a)(1) of the Balanced Budget and Emergency Deficit Control Act of 1985 are met; and—

"(1) the provisions of sections 3(7), 301(i), 302(f), 304(b), and 311(a) of the Congressional Budget and Impoundment Control Act of 1974, section 1106(c) of title 31, United States Code, and part C of the Balanced Budget and Emergency Deficit Control Act of 1985 are suspended for the remainder of the current fiscal year, and

"(2) the provisions of sections 3(7), 301(i), 304(b), and 311(a) (insofar as it relates to section 3(7)) of the Congressional Budget and Impoundment Control Act of

1974, sections 302(f) and 311(a) (except insofar as it relates to section 3(7)) of that Act (but only if a concurrent resolution on the budget under section 301 of that Act, for the fiscal year following the current fiscal year, has been agreed to prior to the introduction of this joint resolution), sections 1105(f) and 1106(c) of title 31, United States Code, and part C of the Balanced Budget and Emergency Deficit Control Act of 1985 are suspended for the fiscal year following the current fiscal year.

This joint resolution shall not have the effect of suspending any final order which was issued for the current fiscal year under section 252(b) of the Balanced Budget and Emergency Deficit Control Act of 1985 if such order was issued before the date of the enactment of this joint resolution.".

(B) The title of the joint resolution shall be "Joint resolution suspending certain provisions of law pursuant to section 254(a)(2) of the Balanced Budget and Emergency Deficit Control Act of 1985."; and the joint resolution shall not contain any preamble.

(3) COMMITTEE ACTION.—Each joint resolution introduced pursuant to paragraph (1) shall be referred to the Committee on the Budget of the House involved; and such Committee shall report the joint resolution to its House without amendment on or before the fifth day on which such House is in session after the date on which the joint resolution is introduced. If the Committee fails to report the joint resolution within the five-day period referred to in the preceding sentence, it shall be automatically discharged from further consideration of the joint resolution, and the joint resolution shall be placed on the appropriate calendar.

(4) CONSIDERATION OF JOINT RESOLUTION.—

(A) A vote on final passage of a joint resolution reported to a House of the Congress or discharged pursuant to paragraph (3) shall be taken on or before the close of the fifth calendar day of session of such House after the date on which the joint resolution is reported to such House or after the Committee has been discharged from further consideration of the joint resolution. If prior to the passage by one House of a joint resolution of that House, that House receives the same joint resolution from the other House, then—

(i) the procedure in that House shall be the same as if no such joint resolution had been received from the other House, but

(ii) the vote on final passage shall be on the joint resolution of the other House.

When the joint resolution is agreed to, the Clerk of the House of Representatives (in the case of a House joint resolution agreed to in the House of Representatives) or the Secretary of the Senate (in the case of a Senate joint resolution agreed to in the Senate) shall cause the joint resolution to be engrossed, certified, and transmitted to the other House of the Congress as soon as practicable.

(B)(i) A motion in the House of Representatives to proceed to the consideration of a joint resolution under this paragraph shall be highly privileged and not debatable. An

amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(ii) Debate in the House of Representatives on a joint resolution under this paragraph shall be limited to not more than five hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion to postpone, made in the House of Representatives with respect to the consideration of a joint resolution under this paragraph, and a motion to proceed to the consideration of other business, shall not be in order. A motion further to limit debate shall not be debatable. It shall not be in order to move to table or to recommit a joint resolution under this paragraph or to move to reconsider the vote by which the joint resolution is agreed to or disagreed to.

(iii) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to a joint resolution under this paragraph shall be decided without debate.

(iv) Except to the extent specifically provided in the preceding provisions of this subsection or in subparagraph (D), consideration of a joint resolution under this subparagraph shall be governed by the Rules of the House of Representatives.

(C)(i) A motion in the Senate to proceed to the consideration of a joint resolution under this paragraph shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(ii) Debate in the Senate on a joint resolution under this paragraph, and all debatable motions and appeals in connection therewith, shall be limited to not more than five hours. The time shall be equally divided between, and controlled by, the majority leader and the minority leader or their designees.

(iii) Debate in the Senate on any debatable motion or appeal in connection with a joint resolution under this paragraph shall be limited to not more than one hour, to be equally divided between, and controlled by, the mover and the manager of the joint resolution, except that in the event the manager of the joint resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee.

(iv) A motion in the Senate to further limit debate on a joint resolution under this paragraph is not debatable. A motion to table or to recommit a joint resolution under this paragraph is not in order.

(D) No amendment to a joint resolution considered under this paragraph shall be in order in either the House of Representatives or the Senate.

(b) CONGRESSIONAL RESPONSE TO PRESIDENTIAL ORDER.—

(1) REPORTING OF RESOLUTIONS, AND RECONCILIATION BILLS AND RESOLUTIONS, IN THE SENATE.—

(A) COMMITTEE ALTERNATIVES TO PRESIDENTIAL ORDER.—Within two days after the submission of a report by the

Comptroller General under section 251(c)(2), each standing committee of the Senate may submit to the Committee on the Budget of the Senate information of the type described in section 301(d) of the Congressional Budget Act of 1974 with respect to alternatives to the order envisioned by such report insofar as such order affects laws within the jurisdiction of the committee.

(B) INITIAL BUDGET COMMITTEE ACTION.—Not later than two days after issuance of a final order by the President under section 252(b) with respect to a fiscal year, the Committee on the Budget of the Senate may report to the Senate a resolution. The resolution may affirm the impact of the order issued under such section, in whole or in part. To the extent that any part of the order is not affirmed, the resolution shall state which parts are not affirmed and shall contain instructions to committees of the Senate of the type referred to in section 310(a) of the Congressional Budget Act of 1974, sufficient to achieve at least the total level of deficit reduction contained in those sections which are not affirmed.

(C) RESPONSE OF COMMITTEES.—Committees instructed pursuant to subparagraph (B), or affected thereby, shall submit their responses to the Budget Committee no later than 10 days after the resolution referred to in subparagraph (B) is agreed to, except that if only one such Committee is so instructed such Committee shall, by the same date, report to the Senate a reconciliation bill or reconciliation resolution containing its recommendations in response to such instructions. A committee shall be considered to have complied with all instructions to it pursuant to a resolution adopted under subparagraph (B) if it has made recommendations with respect to matters within its jurisdiction which would result in a reduction in the deficit at least equal to the total reduction directed by such instructions.

(D) BUDGET COMMITTEE ACTION.—Upon receipt of the recommendations received in response to a resolution referred to in subparagraph (B), the Budget Committee shall report to the Senate a reconciliation bill or reconciliation resolution, or both, carrying out all such recommendations without any substantive revisions. In the event that a committee instructed in a resolution referred to in subparagraph (B) fails to submit any recommendation (or, when only one committee is instructed, fails to report a reconciliation bill or resolution) in response to such instructions, the Budget Committee shall include in the reconciliation bill or reconciliation resolution reported pursuant to this subparagraph legislative language within the jurisdiction of the noncomplying committee to achieve the amount of deficit reduction directed in such instructions.

(E) POINT OF ORDER.—It shall not be in order in the Senate to consider any reconciliation bill or reconciliation resolution reported under subparagraph (D) with respect to a fiscal year, any amendment thereto, or any conference report thereon if—

(i) the enactment of such bill or resolution as reported;

(ii) the adoption and enactment of such amendment; or

(iii) the enactment of such bill or resolution in the form recommended in such conference report,

would cause the amount of the deficit for such fiscal year to exceed the maximum deficit amount for such fiscal year, unless the report submitted under section 251(c)(1) projects negative real economic growth for such fiscal year, or for each of any two consecutive quarters during such fiscal year.

(F) TREATMENT OF CERTAIN AMENDMENTS.—In the Senate, an amendment which adds to a resolution reported under subparagraph (B) an instruction of the type referred to in such subparagraph shall be in order during the consideration of such resolution if such amendment would be in order but for the fact that it would be held to be nongermane on the basis that the instruction constitutes new matter.

(G) DEFINITION.—For purposes of subparagraphs (A), (B), and (C), the term "day" shall mean any calendar day on which the Senate is in session.

(2) PROCEDURES.—

(A) IN GENERAL.—Except as provided in subparagraph (B), in the Senate the provisions of sections 305 and 310 of the Congressional Budget Act of 1974 for the consideration of concurrent resolutions on the budget and conference reports thereon shall also apply to the consideration of resolutions, and reconciliation bills and reconciliation resolutions reported under this paragraph and conference reports thereon.

(B) LIMIT ON DEBATE.—Debate in the Senate on any resolution reported pursuant to paragraph (1)(B), and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to 10 hours.

(C) LIMITATION ON AMENDMENTS.—Section 310(d)(2) of the Congressional Budget Act shall apply to reconciliation bills and reconciliation resolutions reported under this subsection.

(D) BILLS AND RESOLUTIONS RECEIVED FROM THE HOUSE.—Any bill or resolution received in the Senate from the House, which is a companion to a reconciliation bill or reconciliation resolution of the Senate for the purposes of this subsection, shall be considered in the Senate pursuant to the provisions of this subsection.

(E) DEFINITION.—For purposes of this subsection, the term "resolution" means a simple, joint, or concurrent resolution.

(c) CERTAIN RESOLUTIONS TREATED AS RECONCILIATION BILLS.—Resolutions described in subsection (b) of this section and bills reported as a result thereof shall be considered in the Senate to be reconciliation bills or resolutions for purposes of the Congressional Budget Act of 1974.

SEC. 255. EXEMPT PROGRAMS AND ACTIVITIES.

(a) SOCIAL SECURITY BENEFITS AND TIER I RAILROAD RETIREMENT BENEFITS.—Increases in benefits payable under the old-age, survivors, and disability insurance program established under title II of

the Social Security Act, or in benefits payable under section 3(a), 3(f)(3), 4(a), or 4(f) of the Railroad Retirement Act of 1974, shall not be considered "automatic spending increases" for purposes of this title; and no reduction in any such increase or in any of the benefits involved shall be made under any order issued under this part.

(b) VETERANS PROGRAMS.—The following programs shall be exempt from reduction under any order issued under this part:

Veterans' compensation (36–0153–0–1–701); and

Veterans' pensions (36–0154–0–1–701).

(c) NET INTEREST.—No reduction of payments for net interest (all of major functional category 900) shall be made under any order issued under this part.

(d) EARNED INCOME TAX CREDIT.—Payments to individuals made pursuant to section 32 of the Internal Revenue Code of 1954 shall be exempt from reduction under any order issued under this part.

(e) OFFSETTING RECEIPTS AND COLLECTIONS.—Offsetting receipts and collections shall not be reduced under any order issued under this part.

(f) CERTAIN PROGRAM BASES.—Outlays for programs specified in paragraph (1) of section 257 shall be subject to reduction only in accordance with the procedures established in section 251(a)(3)(C) and 256(b).

(g) OTHER PROGRAMS AND ACTIVITIES.—

(1) The following budget accounts and activities shall be exempt from reduction under any order issued under this part:

Activities resulting from private donations, bequests, or voluntary contributions to the Government;

Alaska Power Administration, Operations and maintenance (89–0304–0–1–271);

Appropriations for the District of Columbia (to the extent they are appropriations of locally raised funds);

Bonneville Power Administration fund and borrowing authority established pursuant to section 13 of Public Law 93–454 (1974), as amended (89–4045–0–3–271);

Bureau of Indian Affairs miscellaneous trust funds, tribal trust funds (14–9973–0–7–999);

Claims, defense (97–0102–0–1–051);

Claims, judgments, and relief acts (20–1895–0–1–806);

Coinage profit fund (20–5811–0–2–803);

Compensation of the President (11–0001–0–1–802);

Eastern Indian land claims settlement fund (14–2202–0–1–806);

Exchange stabilization fund (20–4444–0–3–155);

Federal payment to the railroad retirement account (60–0113–0–1–601);

Foreign military sales trust fund (11–8242–0–7–155);

Health professions graduate student loan insurance fund (Health Education Assistance Loan Program) (75–4305–0–3–553);

Intragovernmental funds, including those from which the outlays are derived primarily from resources paid in from other government accounts, except to the extent such funds are augmented by direct appropriations for the fiscal year during which an order is in effect;

Payment of Vietnam and USS Pueblo prisoner-of-war claims (15–0104–0–1–153);

Payment to civil service retirement and disability fund (24-0200-0-1-805);

Payments to copyright owners (03-5175-0-2-376);

Payments to health care trust funds (75-0580-0-1-572);

Payments to military retirement fund (97-0040-0-1-054);

Payments to social security trust funds (75-0404-0-1-571);

Payments to state and local government fiscal assistance trust fund (20-2111-0-1-851);

Payments to the foreign service retirement and disability fund (11-1036-0-1-153 and 19-0540-0-1-153);

Payments to trust funds from excise taxes or other receipts properly creditable to such trust funds;

Postal service fund (18-4020-0-3-372);

Salaries of Article III judges;

Soldiers and Airmen's Home, payment of claims (84-8930-0-7-705);

Southeastern Power Administration, Operations and maintenance (89-0302-0-1-271);

Southwestern Power Administration, Operations and maintenance (89-0303-0-1-271);

Tennessee Valley Authority fund, except non-power programs and activities (64-4110-0-3-999);

Western Area Power Administration, Construction, rehabilitation, operations, and maintenance (89-5068-0-2-271); and

Western Area Power Administration, Colorado River basins power marketing fund (89-4452-0-3-271).

(2) Prior legal obligations of the Government in the following budget accounts and activities shall be exempt from any order issued under this part:

Agency for International Development, Housing, and other credit guarantee programs (72-4340-0-3-151);

Agricultural credit insurance fund (12-4140-0-3-351);

Biomass energy development (20-0114-0-1-271);

Check forgery insurance fund (20-4109-0-3-803);

Community development grant loan guarantees (86-0162-0-1-451);

Credit union share insurance fund (25-4468-0-3-371);

Economic development revolving fund (13-4406-0-3-452);

Employees life insurance fund (24-8424-0-8-602);

Energy security reserve (Synthetic Fuels Corporation) (20-0112-0-1-271);

Export-Import Bank of the United States, Limitation of program activity (83-4027-0-3-155);

Federal Aviation Administration, Aviation insurance revolving fund (69-4120-0-3-402);

Federal Crop Insurance Corporation fund (12-4085-0-3-351);

Federal Deposit Insurance Corporation (51-8419-0-8-371);

Federal Emergency Management Agency, National flood insurance fund (58-4236-0-3-453);

Federal Emergency Management Agency, National insurance development fund (58-4235-0-3-451);

Federal Housing Administration fund (86-4070-0-3-371);

Federal Savings and Loan Insurance Corporation fund (82–4037–0–3–371);

Federal ship financing fund (69–4301–0–3–403);

Federal ship financing fund, fishing vessels (13–4417–0–3–376);

Geothermal resources development fund (89–0206–0–1–271);

Government National Mortgage Association, Guarantees of mortgage-backed securities (86–4238–0–3–371);

Health education loans (75–4307–0–3–553);

Homeowners assistance fund, Defense (97–4090–0–3–051);

Indian loan guarantee and insurance fund (14–4410–0–3–452);

International Trade Administration, Operations and administration (13–1250–0–1–376);

Low-rent public housing, Loans and other expenses (86–4098–0–3–604);

Maritime Administration, War-risk insurance revolving fund (69–4302–0–3–403);

Overseas Private Investment Corporation (71–4030–0–3–151);

Pension Benefit Guaranty Corporation fund (16–4204–0–3–601);

Rail service assistance (69–0122–0–1–401);

Railroad rehabilitation and improvement financing fund (69–4411–0–3–401);

Rural development insurance fund (12–4155–0–3–452);

Rural electric and telephone revolving fund (12–4230–8–3–271);

Rural housing insurance fund (12–4141–0–3–371);

Small Business Administration, Business loan and investment fund (73–4154–0–3–376);

Small Business Administration, Lease guarantees revolving fund (73–4157–0–3–376);

Small Business Administration, Pollution control equipment contract guarantee revolving fund (73-4147–0–3–376);

Small Business Administration, Surety bond guarantees revolving fund (73–4156–0–3–376);

Veterans Administration, Loan guaranty revolving fund (36–4025–0–3–704);

Veterans Administration, National service life insurance fund (36–8132–0–7–701);

Veterans Administration, Service-disabled veterans insurance fund (36–4012–0–3–701);

Veterans Administration, Servicemen's group life insurance fund (36–4009–0–3–701);

Veterans Administration, United States Government life insurance fund (36–8150–0–7–701);

Veterans Administration, Veterans insurance and indemnities (36–0120–0–1–701);

Veterans Administration, Veterans reopened insurance fund (36–4010–0–3–701); and

Veterans Administration, Veterans special life insurance fund (36–8455–0–8–701).

(h) LOW-INCOME PROGRAMS.—The following programs shall be exempt from reduction under any order issued under this part:

Aid to families with dependent children (75–0412–0–1–609);

Child nutrition (12-3539-0-1-605);
Food stamp programs (12-3505-0-1-605 and 12-3550-0-1-605);
Grants to States for Medicaid (75-0512-0-1-551);
Supplemental Security Income Program (75-0406-0-1-609); and
Women, infants, and children program (12-3510-0-1-605).

(i) IDENTIFICATION OF PROGRAMS.—For purposes of subsections (g) and (h), programs are identified by the designated budget account identification code numbers set forth in the Budget of the United States Government, 1986—Appendix.

SEC. 254. EXCEPTIONS, LIMITATIONS, AND SPECIAL RULES.

(a) EFFECT OF REDUCTIONS AND SEQUESTRATIONS.—

(1) REDUCTIONS IN AUTOMATIC SPENDING INCREASES.—Notwithstanding any other provision of law, any change in the Consumer Price Index or any other index measuring costs, prices, or wages (or in any component of any such index), under a program listed in section 257(1), that is not taken into account for purposes of determining the amount of an automatic spending increase (if any) under such program for a fiscal year for which an order is issued under section 252 shall not be taken into account for purposes of determining any automatic spending increase during any fiscal year thereafter.

(2) SEQUESTRATIONS.—Any amount of new budget authority, unobligated balances, obligated balances, new loan guarantee commitments, new direct loan obligations, spending authority (as defined in section 401(c)(2) of the Congressional Budget Act of 1974), or obligation limitations which is sequestered or reduced pursuant to an order issued under section 252 is permanently cancelled, with the exception of amounts sequestered in special or trust funds, which shall remain in such funds and be available in accordance with and to the extent permitted by law, including the provisions of this Act.

(b) TREATMENT OF FEDERAL ADMINISTRATIVE EXPENSES.—

(1) Notwithstanding any other provision of this title, administrative expenses incurred by the departments and agencies, including independent agencies, of the Federal Government in connection with any program, project, activity, or account shall be subject to reduction pursuant to an order issued under section 252, without regard to any exemption, exception, limitation, or special rule which is otherwise applicable with respect to such program, project, activity, or account under this part.

(2) Notwithstanding any other provision of law, administrative expenses of any program, project, activity, or account which is self-supporting and does not receive appropriations shall be subject to reduction under a sequester order, unless specifically exempted in this joint resolution.

(3) Payments made by the Federal Government to reimburse or match administrative costs incurred by a State or political subdivision under or in connection with any program, project, activity, or account shall not be considered administrative expenses of the Federal Government for purposes of this section, and shall be subject to reduction or sequestration under this part to the extent (and only to the extent) that other payments made by the Federal Government under or in connection with that program, project, activity, or account are subject to such

reduction or sequestration; except that Federal payments made to a State as reimbursement of administrative costs incurred by such State under or in connection with the unemployment compensation programs specified in subsection (h)(1) shall be subject to reduction or sequestration under this part notwithstanding the exemption otherwise granted to such programs under that subsection.

(c) EFFECT OF ORDERS ON THE GUARANTEED STUDENT LOAN PROGRAM.—(1) Any reductions which are required to be achieved from the student loan programs operated pursuant to part B of title IV of the Higher Education Act of 1965, as a consequence of an order issued pursuant to section 252, shall be achieved only from loans described in paragraphs (2) and (3) by the application of the measures described in such paragraphs.

(2) For any loan made during the period beginning on the date that an order issued under section 252 takes effect with respect to a fiscal year and ending at the close of such fiscal year, the rate used in computing the special allowance payment pursuant to section 438(b)(2)(A)(iii) of such Act for each of the first four special allowance payments for such loan shall be adjusted by reducing such rate by the lesser of—

(A) 0.40 percent, or

(B) the percentage by which the rate specified in such section exceeds 3 percent.

(3) For any loan made during the period beginning on the date that an order issued under section 252 takes effect with respect to a fiscal year and ending at the close of such fiscal year, the origination fee which is authorized to be collected pursuant to section 438(c)(2) of such Act shall be increased by 0.50 percent.

(d) SPECIAL RULES FOR MEDICARE PROGRAM.—

(1) MAXIMUM PERCENTAGE REDUCTION IN INDIVIDUAL PAYMENT AMOUNTS.—The maximum permissible reduction for the health insurance programs under title XVIII of the Social Security Act for any fiscal year, pursuant to an order issued under section 252, consists only of a reduction of—

(A) 1 percent in the case of fiscal year 1986, and

(B) 2 percent in the case of any subsequent fiscal year,

in each separate payment amount otherwise made for a covered service under those programs without regard to this part.

(2) TIMING OF APPLICATION OF REDUCTIONS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), if a reduction is made under paragraph (1) in payment amounts pursuant to a sequestration order, the reduction shall be applied to payment for services furnished during the effective period of the order. For purposes of the previous sentence, in the case of inpatient services furnished for an individual, the services shall be considered to be furnished on the date of the individual's discharge from the inpatient facility.

(B) PAYMENT ON THE BASIS OF COST REPORTING PERIODS.—In the case in which payment for services of a provider of services is made under title XVIII of the Social Security Act on a basis relating to the reasonable cost incurred for the services during a cost reporting period of the provider, if a reduction is made under paragraph (1) in payment amounts pursuant to a sequestration order, the reduction shall be applied to payment for costs for such services incurred at

any time during each cost reporting period of the provider any part of which occurs during the effective period of the order, but only (for each such cost reporting period) in the same proportion as the fraction of the cost reporting period that occurs during the effective period of the order.

(C) EFFECTIVE PERIOD OF ORDER FOR FISCAL YEAR 1986.—For purposes of this paragraph, the effective period of a sequestration order for fiscal year 1986 is the period beginning on March 1, 1986, and ending on September 30, 1986.

(3) NO INCREASE IN BENEFICIARY CHARGES IN ASSIGNMENT-RELATED CASES.—If a reduction in payment amounts is made under paragraph (1) for services for which payment under part B of title XVIII of the Social Security Act is made on the basis of an assignment described in section 1842(b)(3)(B)(ii), in accordance with section 1842(b)(6)(B), or under the procedure described in section 1870(f)(1), of such Act, the person furnishing the services shall be considered to have accepted payment of the reasonable charge for the services, less any reduction in payment amount made pursuant to a sequestration order, as payment in full.

(4) NO EFFECT ON COMPUTATION OF AAPCC.—In computing the adjusted average per capita cost for purposes of section 1876(a)(4) of the Social Security Act, the Secretary of Health and Human Services shall not take into account any reductions in payment amounts which have been or may be effected under this part.

(e) TREATMENT OF CHILD SUPPORT ENFORCEMENT PROGRAM.—Any order issued by the President under section 252 shall accomplish the full amount of any required reduction in expenditures under sections 455 and 458 of the Social Security Act by reducing the Federal matching rate for State administrative costs under such program, as specified (for the fiscal year involved) in section 455(a) of such Act, to the extent necessary to reduce such expenditures by that amount.

(f) TREATMENT OF FOSTER CARE AND ADOPTION ASSISTANCE PROGRAMS.—Any order issued by the President under section 252 shall make the reduction which is otherwise required under the foster care and adoption assistance programs (established by part E of title IV of the Social Security Act) only with respect to payments and expenditures made by States in which increases in foster care maintenance payment rates or adoption assistance payment rates (or both) are to take effect during the fiscal year involved, and only to the extent that the required reduction can be accomplished by applying a uniform percentage reduction to the Federal matching payments that each such State would otherwise receive under section 474 of that Act (for such fiscal year) for that portion of the State's payments which is attributable to the increases taking effect during that year. No State may, after the date of the enactment of this joint resolution, make any change in the timetable for making payments under a State plan approved under part E of title IV of the Social Security Act which has the effect of changing the fiscal year in which expenditures under such part are made.

(g) FEDERAL PAY.—

(1) IN GENERAL.—For purposes of any order issued under section 252—

(A) Federal pay under a statutory pay system, and

(B) elements of military pay,

shall be subject to reduction under an order in the same manner as other administrative expense components of the Federal budget; except that no such order may reduce or have the effect of reducing the rate of pay to which any individual is entitled under any such statutory pay system or the rate of any element of military pay to which any individual is entitled under title 37, United States Code, or any increase in rates of pay which is scheduled to take effect under section 5305 of title 5, United States Code, section 1009 of title 37, United States Code, or any other provision of law.

(2) DEFINITIONS.—For purposes of this subsection:

(A) The term "statutory pay system" shall have the meaning given that term in section 5301(c) of title 5, United States Code.

(B) The term "elements of military pay" means—

(i) the elements of compensation of members of the uniformed services specified in section 1009 of title 37, United States Code,

(ii) allowances provided members of the uniformed services under sections 403a and 405 of such title, and

(iii) cadet pay and midshipman pay under section 203(c) of such title.

(C) The term "uniformed services" shall have the meaning given that term in section 101(3) of title 37, United States Code.

(h) TREATMENT OF PAYMENTS AND ADVANCES MADE WITH RESPECT TO UNEMPLOYMENT COMPENSATION PROGRAMS.—(1) For purposes of section 252—

(A) any amount paid as regular unemployment compensation by a State from its account in the Unemployment Trust Fund (established by section 904(a) of the Social Security Act),

(B) any advance made to a State from the Federal unemployment account (established by section 904(g) of such Act) under title XII of such Act and any advance appropriated to the Federal unemployment account pursuant to section 1203 of such Act, and

(C) any payment made from the Federal Employees Compensation Account (as established under section 909 of such Act) for the purpose of carrying out chapter 85 of title 5, United States Code, and funds appropriated or transferred to or otherwise deposited in such Account,

shall not be subject to reduction.

(2)(A) A State may reduce each weekly benefit payment made under the Federal-State Extended Unemployment Compensation Act of 1970 for any week of unemployment occurring during any period with respect to which payments are reduced under an order issued under section 252 by a percentage not to exceed the percentage by which the Federal payment to the State under section 204 of such Act is to be reduced for such week as a result of such order.

(B) A reduction by a State in accordance with subparagraph (A) shall not be considered as a failure to fulfill the requirements of section 3304(a)(11) of the Internal Revenue Code of 1954.

(i) TREATMENT OF MINE WORKER DISABILITY COMPENSATION INCREASES AS AUTOMATIC SPENDING INCREASES.—An order issued by the President under section 252 may not result in eliminating or reducing an increase in disability benefits under the Federal Mine Safety and Health Act except in the manner provided for automatic

spending increases under section 252(a)(1)(A), and no such increase may, pursuant to such section, be reduced below zero.

(j) COMMODITY CREDIT CORPORATION.—

(1) POWERS AND AUTHORITIES OF THE COMMODITY CREDIT CORPORATION.—This title shall not restrict the Commodity Credit Corporation in the discharge of its authority and responsibility as a corporation to buy and sell commodities in world trade, to use the proceeds as a revolving fund to meet other obligations and otherwise operate as a corporation, the purpose for which it was created.

(2) REDUCTION IN PAYMENTS MADE UNDER CONTRACTS.—(A) Payments and loan eligibility under any contract entered into with a person by the Commodity Credit Corporation prior to the time an order has been issued under section 252 shall not be reduced by an order subsequently issued. Subject to subparagraph (B), after an order is issued under such section for a fiscal year, any cash payments made by the Commodity Credit Corporation—

(i) under the terms of any one-year contract entered into in such fiscal year and after the issuance of the order; and

(ii) out of an entitlement account,

to any person (including any producer, lender, or guarantee entity) shall be subject to reduction under the order.

(B) Each contract entered into with producers or producer cooperatives with respect to a particular crop of a commodity and subject to reduction under subparagraph (A) shall be reduced in accordance with the same terms and conditions. If some, but not all, contracts applicable to a crop of a commodity have been entered into prior to the issuance of an order under section 252, the order shall provide that the necessary reduction in payments under contracts applicable to the commodity be uniformly applied to all contracts for the next succeeding crop of the commodity, under the authority provided in paragraph (3).

(3) DELAYED REDUCTION IN OUTLAYS PERMISSIBLE.—Notwithstanding any other provision of this joint resolution, if an order under section 252 is issued with respect to a fiscal year, any reduction under the order applicable to contracts described in paragraph (1) may provide for reductions in outlays for the account involved to occur in the fiscal year following the fiscal year to which the order applies. No other account, or other program, project, or activity, shall bear an increased reduction for the fiscal year to which the order applies as a result of the operation of the preceding sentence.

(4) UNIFORM PERCENTAGE RATE OF REDUCTION AND OTHER LIMITATIONS.—All reductions described in paragraph (2) which are required to be made in connection with an order issued under section 252 with respect to a fiscal year—

(A) shall be made so as to ensure that outlays for each program, project, activity, or account involved are reduced by a percentage rate that is uniform for all such programs, projects, activities, and accounts, and may not be made so as to achieve a percentage rate of reduction in any such item exceeding the rate specified in the order; and

(B) with respect to commodity price support and income protection programs, shall be made in such manner and under such procedures as will attempt to ensure that—

(i) uncertainty as to the scope of benefits under any such program is minimized;

(ii) any instability in market prices for agricultural commodities resulting from the reduction is minimized; and

(iii) normal production and marketing relationships among agricultural commodities (including both contract and non-contract commodities) are not distorted.

In meeting the criterion set out in clause (iii) of subparagraph (B) of the preceding sentence, the President shall take into consideration that reductions under an order may apply to programs for two or more agricultural commodities that use the same type of production or marketing resources or that are alternative commodities among which a producer could choose in making annual production decisions.

(5) No DOUBLE REDUCTION.—No agricultural price support or income protection program that is subject to reduction under an order issued under section 252 for a fiscal year may be subject, as well, to modification or suspension under such order as an automatic spending increase.

(6) CERTAIN AUTHORITY NOT TO BE LIMITED.—Nothing in this joint resolution shall limit or reduce, in any way, any appropriation that provides the Commodity Credit Corporation with budget authority to cover the Corporation's net realized losses.

(k) COMMUNITY AND MIGRANT HEALTH CENTERS, INDIAN HEALTH SERVICES AND FACILITIES, AND VETERANS' MEDICAL CARE.—

(1) The maximum permissible reduction in budget authority for any account listed in paragraph (2) for any fiscal year, pursuant to an order issued under section 252, shall be—

(A) 1 percent in the case of the fiscal year 1986, and

(B) 2 percent in the case of any subsequent fiscal year.

(2) The accounts referred to in paragraph (1) are as follows:

(A) Community health centers (75–0350–0–1–550).

(B) Migrant health centers (75–0350–0–1–550).

(C) Indian health facilities (75–0391–0–1–551).

(D) Indian health services (75–0390–0–1–551).

(E) Veterans' medical care (36–0160–0–1–703).

For purposes of the preceding provisions of this paragraph, programs are identified by the designated budget account identification code numbers set forth in the Budget of the United States Government—Appendix.

(l) TREATMENT OF OBLIGATED BALANCES.—

(1) IN GENERAL.—Except as provided in paragraph (2), obligated balances shall not be subject to reduction under an order issued under section 252.

(2) EXCEPTION.—Existing contracts in major functional category 050 (other than (A) those contracts which include a specified penalty for cancellation or modification by the Government and which if so cancelled or modified would result (due to such penalty) in a net loss to the Government for the fiscal year, and (B) those contracts the reduction of which would violate the legal obligations of the Government) shall be subject to reduction, in accordance with section 251(d)(3), under an order issued under section 252.

(3) DEFINITION.—For purposes of this subsection, the term "existing contracts" shall include all military and civilian con-

tracts in major functional category 050 which exist at the time the order involved is issued under section 252.

SEC. 257. DEFINITIONS.

For purposes of this title:

(1) The term "automatic spending increase" (except as otherwise provided in sections 255 and 256) means—

(A) increases in budget outlays due to changes in indexes in the following Federal programs:

Black lung benefits (20-8144-0-7-601);

Central Intelligence Agency retirement and disability system fund (56-3400-0-1-054);

Civil service retirement and disability fund (24-8135-0-7-602);

Comptrollers general retirement system (05-0107-0-1-801);

Foreign service retirement and disability fund (19-8186-0-7-602);

Judicial survivors' annuities fund (10-8110-0-7-602);

Longshoremen's and harborworkers' compensation benefits (16-9971-0-7-601);

Military retirement fund (97-8097-0-7-602);

National Oceanic and Atmospheric Administration retirement (13-1450-0-1-306);

Pensions for former Presidents (47-0105-0-1-802);

Railroad retirement tier II (60-8011-0-7-601);

Retired pay, Coast Guard (69-0241-0-1-403);

Retirement pay and medical benefits for commissioned officers, Public Health Service (75-0379-0-1-551);

Special benefits, Federal Employees' Compensation Act (16-1521-0-1-600);

Special benefits for disabled coal miners (75-0409-0-1-601); and

Tax Court judges survivors annuity fund (23-8115-0-7-602); and

(B) increases in budget outlays due to changes in indexes in the following Federal programs:

National Wool Act (12-4336-0-3-351);

Special milk program (12-3502-0-1-605); and

Vocational rehabilitation (91-0301-0-1-506).

For purposes of the preceding provisions of this paragraph, programs are identified by the designated budget account identification code numbers set forth in the Budget of the United States Government, 1986—Appendix.

(2) The terms "budget outlays" and "budget authority" have the meaning given to such terms in sections 3(1) and 3(2), respectively, of the Congressional Budget and Impoundment Control Act of 1974.

(3) The term "concurrent resolution on the budget" has the meaning given to such term in section 3(4) of the Congressional Budget and Impoundment Control Act of 1974.

(4) The term "deficit" has the meaning given to such term in section 3(6) of the Congressional Budget and Impoundment Control Act of 1974.

(5) The term "maximum deficit amount", with respect to any fiscal year, means the maximum deficit amount for such fiscal

year determined under section 3(7) of the Congressional Budget and Impoundment Control Act of 1974.

(6) The term "real economic growth", with respect to any fiscal year, means the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions.

(7) The terms "sequester" and "sequestration" (subject to section 252(a)(4)) refer to or mean the cancellation of new budget authority, unobligated balances, obligated balances, new loan guarantee commitments, new direct loan obligations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, and the reduction of obligation limitations.

(8) The term "account" means an item for which appropriations are made in any appropriation Act used to determine the budget base, and, for items not provided for in appropriation Acts, such term means an item for which there is a designated budget account identification code number in the Appendix to the President's budget.

PART D—BUDGETARY TREATMENT OF SOCIAL SECURITY TRUST FUNDS

SEC. 261. TREATMENT OF TRUST FUNDS.

(a) FISCAL YEARS 1986 THROUGH 1992.—

(1) IN GENERAL.—Section 710 of the Social Security Act (as added by paragraph (1) of subsection (a) of section 346 of the Social Security Amendments of 1983) is amended—

(A) by striking out all beginning with "the" the first place it appears down through "Disability Insurance Trust Fund, the" and inserting in lieu thereof "the";

(B) by striking out the comma after "Hospital Insurance Trust Fund";

(C) by striking out "sections 1401, 3101, and 3111" and inserting in lieu thereof "sections 1401(b), 3101(b), and 3111(b)";

(D) by redesignating all after the section designation as subsection (b);

(E) by inserting immediately after the section designation the following:

"(a) The receipts and disbursements of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, and the taxes imposed under sections 1401(a), 3101(a), and 3111(a) of the Internal Revenue Code of 1954, shall not be included in the totals of the budget of the United States Government as submitted by the President or of the congressional budget and shall be exempt from any general budget limitation imposed by statute on expenditures and net lending (budget outlays) of the United States Government."; and

(F) by adding at the end thereof the following new subsection:

"(c) No provision of law enacted after the date of the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985 (other than a provision of an appropriation Act that appropriates funds authorized under the Social Security Act as in effect on the date of the enactment of the Balanced Budget and Emergency

Deficit Control Act of 1985) may provide for payments from the general fund of the Treasury to the Federal Old-Age and Survivors Insurance Trust Fund or the Federal Disability Insurance Trust Fund, or for payments from either such Trust Fund to the general fund of the Treasury.".

(2) APPLICATION.—The amendments made by paragraph (1) shall apply with respect to fiscal years beginning after September 30, 1985, and ending before October 1, 1992.

(b) FISCAL YEAR 1993 AND THEREAFTER.—Section 710(a) of the Social Security Act (42 U.S.C. 911 note), as amended by section 346(b) of the Social Security Amendments of 1983 (to be effective with respect to fiscal years beginning after September 30, 1992) is amended—

(1) by inserting "(1)" after the subsection designation; and

(2) by adding at the end thereof the following new paragraph:

"(2) No provision of law enacted after the date of the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985 (other than a provision of an appropriation Act that appropriates funds authorized under the Social Security Act as in effect on the date of the enactment of the Balanced Budget and Emergency Deficit Control Act of 1985) may provide for payments from the general fund of the Treasury to any Trust Fund specified in paragraph (1) or for payments from any such Trust Fund to the general fund of the Treasury.".

PART E—MISCELLANEOUS AND RELATED PROVISIONS

SEC. 271. WAIVERS AND SUSPENSIONS; RULEMAKING POWERS.

(a) BUDGET ACT WAIVERS IN THE SENATE.—Section 904 of the Congressional Budget Act of 1974 is amended by redesignating subsection (c) as subsection (d), and by inserting after subsection (b) the following new subsection:

"(c) Sections 305(b)(2) and 306 of this Act may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn.".

(b) OTHER WAIVERS AND SUSPENSIONS IN THE SENATE.—Sections 301(i), 302(f), 304(b), 310(d), 310(g), and 311(a) of the Congressional Budget Act of 1974 may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn. This subsection shall not apply to any joint resolution reported or discharged pursuant to section 254(a) of this joint resolution.

(c) RULEMAKING POWERS.—The provisions of this title, other than those relating to the activities of the executive and judicial branches of the Government, are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

SEC. 272. RESTORATION OF TRUST FUND INVESTMENTS.

(a) RESTORATION OF SOCIAL SECURITY TRUST FUNDS AND CERTAIN OTHER FUNDS.—

(1) REISSUANCE OF OBLIGATIONS.—The Secretary of the Treasury shall immediately reissue to each fund listed in paragraph (3) obligations under chapter 31 of title 31, United States Code, which are identical, with respect to interest rate and maturity, to public debt obligations held by such fund which—

(A) were redeemed during the period beginning with September 1, 1985, and ending with September 29, 1985, and

(B) as determined by such Secretary on the basis of standard investment procedures for such fund in effect on September 1, 1985, would not have been redeemed if H.J. Res. 372 (99th Congress, 1st Session), as deemed passed by the House of Representatives on August 1, 1985, had been enacted into law on August 1, 1985.

Such obligations shall be substituted for obligations which are held by such fund on the date of the enactment of this joint resolution in a manner which will ensure that, after such substitution, the holdings of such fund will replicate to the maximum extent practicable the holdings which would have been held by such fund on such date if H.J. Res. 372 (99th Congress, 1st Session), as deemed passed by the House of Representatives on August 1, 1985, had been enacted into law on August 1, 1985.

(2) APPROPRIATION TO FUNDS OF INTEREST LOST ON OR AFTER SEPTEMBER 1, 1985.—The Secretary of the Treasury shall pay on the normal interest payment date to each fund listed in paragraph (3), from amounts in the general fund of the Treasury not otherwise appropriated, an amount determined by such Secretary to be equal to the excess of—

(A) the net amount of interest which would have been earned by such fund, during the period beginning with September 1, 1985, and ending with the date of the enactment of this joint resolution, if all noninvestments, redemptions, and disinvestments with respect to such fund which—

(i) occurred during such period, and

(ii) would not have occurred if H.J. Res. 372 (99th Congress, 1st Session), as deemed passed by the House of Representatives on August 1, 1985, had been enacted into law on August 1, 1985,

had not occurred, over

(B) the net amount of interest actually earned by such fund during such period.

(3) FUNDS AFFECTED.—The funds referred to in paragraphs (1) and (2) are the following:

(A) the Federal Old-Age and Survivors Insurance Trust Fund,

(B) the Federal Disability Insurance Trust Fund,

(C) the Federal Hospital Insurance Trust Fund,

(D) the Federal Supplementary Medical Insurance Trust Fund,

(E) the Railroad Retirement Account,

(F) the Civil Service Retirement and Disability Fund, and

(G) all other funds (other than the funds referred to in subsection (b) or (c)) listed in Table III of the Monthly Statement of the Public Debt issued by the Department of the Treasury for November 30, 1985.

(b) RESTORATION OF DEPARTMENT OF DEFENSE MILITARY RETIREMENT FUND.—

(1) ISSUANCE OF OBLIGATIONS.—The Secretary of the Treasury shall immediately issue to the Department of Defense Military Retirement Fund obligations under chapter 31 of title 31, United States Code, which such Secretary, in consultation with the Secretary of Defense, determines would have been issued to such fund on October 1, 1985, if H.J. Res. 372 (99th Congress, 1st Session), as deemed passed by the House of Representatives on August 1, 1985, had been enacted into law on August 1, 1985. Such obligations shall be market-based special obligations issued at prices, including accrued interest, prevailing for such obligations on October 1, 1985. Such obligations shall be substituted for all obligations which were purchased by such fund during the period beginning with October 1, 1985, and ending with November 14, 1985, with amounts which were transferred to such fund on October 1, 1985.

(2) APPROPRIATION TO FUND OF INTEREST LOST ON OR AFTER OCTOBER 1, 1985.—

(A) IN GENERAL.—The Secretary of the Treasury shall immediately pay to the Department of Defense Military Retirement Fund, from amounts in the general fund of the Treasury not otherwise appropriated, an amount determined by such Secretary, in consultation with the Secretary of Defense, to be equal to the excess of—

(i) the interest which would have been earned by such fund during the period beginning with October 1, 1985, and ending with November 14, 1985, if the obligations issued pursuant to paragraph (1) had been issued on October 1, 1985, over

(ii) the amount of interest actually collected by such fund during such period on obligations purchased by such fund with amounts which were transferred to such fund on October 1, 1985.

(B) INVESTMENT OF INTEREST RECEIPTS.—The Secretary of the Treasury shall immediately invest the amount paid to the Department of Defense Military Retirement Fund pursuant to subparagraph (A) in obligations designated by the Secretary of Defense. Such obligations shall be market-based special obligations issued with an issue date of November 15, 1985, and at prices, including accrued interest, prevailing for such obligations on November 15, 1985.

(c) APPROPRIATION TO CERTAIN FUNDS WITH RESPECT TO UNINVESTED BALANCES AFTER DECEMBER 6, 1985.—

(1) IN GENERAL.—The Secretary of the Treasury shall immediately pay, from amounts in the general fund not otherwise appropriated, to each fund which is listed in Table III of the Monthly Statement of the Public Debt issued by the Department of the Treasury for November 30, 1985, and which invests in market-based special obligations under chapter 31 of title 31, United States Code, an amount equal to the interest which would have been earned by such fund during the period begin-

ning with December 7, 1985, and ending with the date of the enactment of this joint resolution, if the daily balance in such fund which the Secretary of the Treasury was requested to invest during such period but was unable to invest, because of the expiration of the temporary debt limit, had been invested each day during such period, overnight, in obligations under such chapter 31 earning interest at a rate determined by the Secretary of the Treasury in accordance with the standard practice of the Department of the Treasury.

(2) EXPIRATION OF TEMPORARY DEBT LIMIT DEFINED.—For purposes of paragraph (1), the term "expiration of the temporary debt limit" means the expiration of the period described in section 1 of the Act entitled "An Act to temporarily increase the limit on the public debt and to restore the investments of the Social Security Trust Funds and other trust funds", approved November 14, 1985 (Public Law 99-155).

(d) ADDITIONAL APPROPRIATION TO OASDI TRUST FUNDS OF INTEREST LOST FROM ACTIONS TAKEN IN SEPTEMBER AND OCTOBER 1984.—

(1) IN GENERAL.—On December 31, 1985, the Secretary of the Treasury shall pay to the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund, from amounts in the general fund of the Treasury not otherwise appropriated, amounts determined under this subsection.

(2) AMOUNT PAID TO EACH TRUST FUND.—The amount paid to each such Trust Fund pursuant to paragraph (1) shall be an amount determined jointly by the Secretary of the Treasury and the Secretary of Health and Human Services to be sufficient to fully compensate such Trust Fund for interest losses arising from the premature redemption, during the period beginning with September 1, 1984, and ending with October 31, 1984, of securities maturing during the period beginning with calendar year 1987 and ending with calendar year 1991.

(3) LIMITATION.—The total amount paid from the general fund of the Treasury pursuant to paragraph (1) shall not exceed $550,000,000.

(4) ADJUSTMENTS.—

(A) DETERMINATION OF SHORTFALLS AND EXCESSES IN PAYMENTS TO TRUST FUNDS.—As soon as practicable after May 31, 1986, the Secretary of the Treasury and the Secretary of Health and Human Services shall jointly determine any shortfall or excess in the amount paid to each Trust Fund pursuant to paragraph (1) caused by—

(i) the difference between actual interest rates and interest rates assumed for purposes of paragraph (1), and

(ii) the difference between the actual amount of securities redeemed in January 1986 for purposes of compliance with section 201(l)(3)(B) of the Social Security Act and the amount of securities assumed for purposes of paragraph (1) to be redeemed in such month for purposes of compliance with such section.

(B) PAYMENT OF SHORTFALLS AND EXCESSES.—On June 30, 1986, the Secretary of the Treasury shall—

(i) in the case of a shortfall in the amount paid to either Trust Fund determined pursuant to subpara-

graph (A), pay to such Trust Fund, from amounts in the general fund of the Treasury not otherwise appropriated, the amount of such shortfall, or

(ii) in the case of an excess in the amount paid to either Trust Fund determined pursuant to subparagraph (A), pay to the general fund of the Treasury, from such Trust Fund, the amount of such excess (but not to exceed the amount paid to such Trust Fund pursuant to paragraph (1)).

SEC. 273. REVENUE ESTIMATES.

For the purposes of revenue legislation which is income, estate and gift, excise, and payroll taxes (i.e., Social Security), considered or enacted in any session of Congress, the Congressional Budget Office shall use exclusively during that session of Congress revenue estimates provided to it by the Joint Committee on Taxation. During that session of Congress such revenue estimates shall be transmitted by the Congressional Budget Office to any committee of the House of Representatives or the Senate requesting such estimates, and shall be used by such Committees in determining such estimates. The Budget Committees of the Senate and House shall determine all estimates with respect to scoring points of order and with respect to the execution of the purposes of this title and the Congressional Budget and Impoundment Control Act of 1974.

SEC. 274. JUDICIAL REVIEW.

(a) EXPEDITED REVIEW.—

(1) Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any order that might be issued pursuant to section 252 violates the Constitution.

(2) Any Member of Congress, or any other person adversely affected by any action taken under this title, may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief concerning the constitutionality of this title.

(3) Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory and injunctive relief on the ground that the terms of an order issued under section 252 do not comply with the requirements of this title.

(4) A copy of any complaint in an action brought under paragraph (1), (2), or (3) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each House of Congress shall have the right to intervene in such action.

(5) Any action brought under paragraph (1), (2), or (3) shall be heard and determined by a three-judge court in accordance with section 2284 of title 28, United States Code.

Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under paragraph (1), (2), or (3) without the necessity of adopting a resolution to authorize such intervention.

(b) APPEAL TO SUPREME COURT.—Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought

under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is entered. No stay of an order issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be issued by a single Justice of the Supreme Court.

(c) EXPEDITED CONSIDERATION.—It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

(d) NONCOMPLIANCE WITH SEQUESTRATION PROCEDURES.—

(1) If it is finally determined by a court of competent jurisdiction that an order issued by the President under section 252(b) for any fiscal year—

(A) does not reduce automatic spending increases under any program specified in section 257(l) to the extent that such increases are required to be reduced by part C of this title (or reduces such increases by a greater extent than is so required),

(B) does not sequester the amount of new budget authority, new loan guarantee commitments, new direct loan obligations, or spending authority which is required to be sequestered by such part (or sequesters more than that amount) with respect to any program, project, activity, or account, or

(C) does not reduce obligation limitations by the amount by which such limitations are required to be reduced under such part (or reduces such limitations by more than that amount) with respect to any program, project, activity, or account,

the President shall, within 20 days after such determination is made, revise the order in accordance with such determination.

(2) If the order issued by the President under section 252(b) for any fiscal year—

(A) does not reduce any automatic spending increase to the extent that such increase is required to be reduced by part C of this title,

(B) does not sequester any amount of new budget authority, new loan guarantee commitments, new direct loan obligations, or spending authority which is required to be sequestered by such part, or

(C) does not reduce any obligation limitation by the amount by which such limitation is required to be reduced under such part,

on the claim or defense that the constitutional powers of the President prevent such sequestration or reduction or permit the avoidance of such sequestration or reduction, and such claim or defense is finally determined by the Supreme Court of the United States to be valid, then the entire order issued pursuant to section 252(b) for such fiscal year shall be null and void.

(e) TIMING OF RELIEF.—No order of any court granting declaratory or injunctive relief from the order of the President issued under section 252, including but not limited to relief permitting or requiring the expenditure of funds sequestered by such order, shall take

effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has entered its final order disposing of such action.

(f) ALTERNATIVE PROCEDURES FOR THE JOINT REPORTS OF THE DIRECTORS.—

(1) In the event that any of the reporting procedures described in section 251 are invalidated, then any report of the Directors referred to in section 251(a) or (c)(1) shall be transmitted to the joint committee established under this subsection.

(2) Upon the invalidation of any such procedure there is established a Temporary Joint Committee on Deficit Reduction, composed of the entire membership of the Budget Committees of the House of Representatives and the Senate. The Chairman of these two committees shall act as Co-Chairmen of the Joint Committee. Actions taken by the Joint Committee shall be determined by the majority vote of the members representing each House. The purposes of the Joint Committee are to receive the reports of the Directors as described in paragraph (1), and to report (with respect to each such report of the Directors) a joint resolution as described in paragraph (3).

(3) No later than 5 days after the receipt of a report of the Directors in accordance with paragraph (1), the Joint Committee shall report to the House of Representatives and the Senate a joint resolution setting forth the contents of the report of the Directors.

(4) The provisions relating to the consideration of a joint resolution under section 254(a)(4) shall apply to the consideration of a joint resolution reported pursuant to this subsection in the House of Representatives and the Senate, except that debate in each House shall be limited to two hours.

(5) Upon its enactment, the joint resolution shall be deemed to be the report received by the President under section 251(b) or (c)(2) (whichever is applicable).

(g) PRESERVATION OF OTHER RIGHTS.—The rights created by this section are in addition to the rights of any person under law, subject to subsection (e).

(h) ECONOMIC DATA, ASSUMPTIONS, AND METHODOLOGIES.—The economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays, as specified in any report issued by the Comptroller General under section 251(b) or (c)(2), shall not be subject to review in any judicial or administrative proceeding.

SEC. 275. EFFECTIVE DATES.

(a) IN GENERAL.—

(1) Except as provided in paragraph (2) and in subsections (b) and (c), this title and the amendments made by this title shall become effective on the date of the enactment of this title and shall apply with respect to fiscal years beginning after September 30, 1985.

(2)(A) The amendment made by section 201(a)(2), and the amendment made by section 201(b) insofar as it relates to subsections (c), (f), and (g) of section 302 of the Congressional Budget Act of 1974 and to subsections (c), (d), and (g) of section 310 of that Act), shall become effective April 15, 1986.

(B) The amendment made by section 212 shall become effective February 1, 1986.

(b) EXPIRATION.—

(1) Part C of this title, and the other provisions contained in or added by this title which are listed in paragraph (2), shall expire September 30, 1991.

(2) The other provisions referred to in paragraph (1) are as follows:

(A) section 3(7) of the Congressional Budget and Impoundment Control Act of 1974 and the second sentence of section 3(6) of such Act (as added by section 201(a)(1) of this joint resolution);

(B) sections 301(i) and 304(b) of the Congressional Budget Act of 1974 and the portion of section 311(a) of such Act which begins with "or, in the Senate" and ends with "paragraph (2) of such subsection)" (as added by section 201(b) of this joint resolution);

(C) sections 1105(f) and 1106(c) of title 31, United States Code (as added by sections 241(b) and 242(b) of this joint resolution); and

(D) section 271(b) of this joint resolution.

(c) OASDI TRUST FUNDS.—The amendments made by part D shall apply as provided in such part.

Speaker of the House of Representatives.

Vice President of the United States and
President of the Senate.

have been rendered homeless or are in needy circumstances as the
result of the recent flood due to the overflow of the Arkansas River and
its tributaries, and in executing this joint resolution, the Secretary
of War is directed so far as possible to cooperate with the authorities
of the State of Colorado, a: d the mayors of such cities on the Arkansas
River or its tributaries as may have sustained damages.

Approved, June 8, 1921.

June 10, 1921.
[S. 1084.]
[Public, No. 13.]

CHAP. 18.—An Act To provide a national budget system and an independent audit of Government accounts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

Budget and Accounting Act, 1921.

Title I.—Definitions.

Title of Act.

Section 1. This Act may be cited as the "Budget and Accounting Act, 1921."

Meaning of terms.

Sec. 2. When used in this Act—

"Department and establishment."

The terms "department and establishment" and "department or.
establishment" mean any executive department, independent com-
mission, board, bureau, office, agency, or other establishment of the
Government, including the municipal government of the District
of Columbia, but do not include the Legislative Branch of the Gov-
ernment or the Supreme Court of the United States;

Congress and Supreme Court, not included.

"The Budget."

The term "the Budget" means the Budget required by s. tion 201 to be transmitted to Congress;

"Bureau."

The term "Bureau" means the Bureau of the Budget;

"Director."

The term "Director" means the Director of the Bureau of the Budget; and

"Assistant Director."

The term "Assistant Director" means the Assistant Director of the Bureau of the Budget.

The Budget.

Title II.—The Budget.

President to send, annually to Congress.

Sec. 201. The President shall transmit to Congress on the first day of each regular session, the Budget, which shall set forth in summary and in detail:

Contents.
Estimates of expenditures and appropriations for ensuing year.
For Congress and Supreme Court without revision.

(a) Estimates of the expenditures and appropriations necessary
in his judgment for the support of the Government for the ensuing
fiscal year; except that the estimates for such year for the Legis-
lative Branch of the Government and the Supreme Court of the
United States shall be transmitted to the President on or before
October 15th of each year, and shall be included by him in the
Budget without revision;

Estimates of receipts for ensuing year.

(b) His estimates of the receipts of the Government during the
ensuing fiscal year, under (1) laws existing at the time the Budget
is transmitted and also (2) under the revenue proposals, if any,
contained in the Budget;

Expenditures and receipts of the last year.

(c) The expenditures and receipts of the Government during the last completed fiscal year;

Estimates of expenditures and receipts of current year.

(d) Estimates of the expenditures and receipts of the Government during the fiscal year in progress;

Amount available November first of current year for expenditures.

(e) The amount of annual, permanent, or other appropriations,
including balances of appropriations for prior fiscal years, available
for expenditure during the fiscal year in progress, as of November
1 of such year;

Condition of Treasury at end of last year, and estimates for current and ensuing years.

(f) Balanced statements of (1) the condition of the Treasury at
the end of the last completed fiscal year, (2) the estimated condition
of the Treasury at the end of the fiscal year in progress, and (3)

the estimated condition of the Treasury at the end of the ensuing
fiscal year if the financial proposals contained in the Budget are
adopted;

Government indebtedness.

(g) All essential facts regarding the bonded and other indebtedness of the Government; and

Other data of financial condition.

(h) Such other financial statements and data as in his opinion are
necessary or desirable in order to make known in all practicable
detail the financial condition of the Government.

Recommendations to meet deficiency if estimated resources less than proposed expenditures.

Sec. 202. (a) If the estimated receipts for the ensuing fiscal year
contained in the Budget, on the basis of laws existing at the time
the Budget is transmitted, plus the estimated amounts in the Treas-
ury at the close of the fiscal year in progress, available for expend-
iture in the ensuing fiscal year, are less than the estimated expend-
itures for the ensuing fiscal year contained in the Budget, the Presi-
dent in the Budget shall make recommendations to Congress for new
taxes, loans, or other appropriate action to meet the estimated
deficiency.

Recommendations if proposed expenditures less than estimated resources.

(b) If the aggregate of such estimated receipts and such estimated
amounts in the Treasury is greater than such estimated expenditures
for the ensuing fiscal year, he shall make such recommendations as
in his opinion the public interests require.

Supplemental or deficiency estimates authorized to meet necessary expenses.

Sec. 203. (a) The President from time to time may transmit to
Congress supplemental or deficiency estimates for such appropria-
tions or expenditures as in his judgment (1) are necessary on account
of laws enacted after the transmission of the Budget, or (2) are other-
wise in the public interest. He shall accompany such estimates
with a statement of the reasons therefor, including the reasons for
their omission from the Budget.

Reasons for, to accompany.

Recommendations if exceeding estimated resources.

(b) Whenever such supplemental or deficiency estimates reach an
aggregate which, if they had been contained in the Budget, would
have required the President to make a recommendation under
subdivision (a) of section 202, he shall thereupon make such
recommendation.

Former arrangements of estimates, etc., continued.

Sec. 204. (a) Except as otherwise provided in this Act, the
contents, order, and arrangement of the estimates of appropriations
and the statements of expenditures and estimated expenditures
contained in the Budget or transmitted under section 203, and the
notes and other data submitted therewith, shall conform to the
requirements of existing law.

Statements to accompany lump sum estimates.

(b) Estimates for lump-sum appropriations contained in the
Budget or transmitted under section 203 shall be accompanied by
statements showing, in such detail and form as may be necessary
to inform Congress, the manner of expenditure of such appropriations
and of the corresponding appropriations for the fiscal year in progress
and the last completed fiscal year. Such statements shall be in lieu
of statements of like character now required by law.

In lieu of present requirements.

Alternative budget for fiscal year 1923, to be submitted.

Sec. 205. The President, in addition to the Budget, shall transmit
to Congress on the first Monday in December, 1921, for the service
of the fiscal year ending June 30, 1923, only, an alternative budget,
which shall be prepared in such form and amounts and according to
such system of classification and itemization as is, in his opinion,
most appropriate, with such explanatory notes and tables as may be
necessary to show where the various items embraced in the Budget
are contained in such alternative budget.

Form, recommendations, etc.

Restriction on submission of estimates, etc., by other officers or employees.

Sec. 206. No estimate or request for an appropriation and no
request for an increase in an item of any such estimate or request,
and no recommendation as to how the revenue needs of the Govern-
ment should be met, shall be submitted to Congress or any com-
mittee thereof by any officer or employee of any department or
establishment, unless at the request of either House of Congress.

Budget Bureau created in Treasury Department.
Director and Assistant Director for.
Duties of Assistant Director.
Functions of Bureau.

Sec. 207. There is hereby created in the Treasury Department a Bureau to be known as the Bureau of the Budget. There shall be in the Bureau a Director and an Assistant Director, who shall be appointed by the President and receive salaries of $10,000 and $7,500 a year, respectively. The Assistant Director shall perform such duties as the Director may designate, and during the absence or incapacity of the Director or during a vacancy in the office of Director he shall act as Director. The Bureau, under such rules and regulations as the President may prescribe, shall prepare for him the Budget, the alternative Budget, and any supplemental or deficiency estimates, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments.

Authority of Director over personnel, expenses, etc.

Sec. 208. (a) The Director, under such rules and regulations as the President may prescribe, shall appoint and fix the compensation of attorneys and other employees and make expenditures for rent in the District of Columbia, printing, binding, telegrams, telephone service, law books, books of reference, periodicals, stationery, furniture, office equipment, other supplies, and necessary expenses of the office, within the appropriations made therefor.

Pay restriction.

(b) No person appointed by the Director shall be paid a salary at a rate in excess of $6,000 a year, and not more than four persons so appointed shall be paid a salary at a rate in excess of $5,000 a year.

Application of civil service laws, etc.

(c) All employees in the Bureau whose compensation is at a rate of $5,000 a year or less shall be appointed in accordance with the civil-service laws and regulations.

Transfer of Federal employees permitted until June 30, 1922.
Vol. 34, p. 449.

(d) The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal years ending June 30, 1921, and June 30, 1922, to the transfer of employees to the Bureau.

Bureau employees allowed additional pay of $240 a year.
Vol. 41, pp. 649, 1308.

(e) The Bureau shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed civilian employees under the provisions of section 6 of the Legislative, Executive, and Judicial Appropriation Act for the fiscal years ending June 30, 1921, and June 30, 1922, if otherwise entitled thereto.

Detailed study by Bureau for securing greater economy and efficiency in public service.
Report to President of results.
Transmittal to Congress.

Sec. 209. The Bureau, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and methods of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular activities to particular services, or (4) the regrouping of services. The results of such study shall be embodied in a report or reports to the President, who may transmit to Congress such report or reports or any part thereof with his recommendations on the matters covered thereby.

Laws relating to preparing receipts and expenditures and estimates for Congress to be codified.
Transmittal by President with recommendations for changes, etc.

Sec. 210. The Bureau shall prepare for the President a codification of all laws or parts of laws relating to the preparation and transmission to Congress of statements of receipts and expenditures of the Government and of estimates of appropriations. The President shall transmit the same to Congress on or before the first Monday in December, 1921, with a recommendation as to the changes which, in his opinion, should be made in such laws or parts of laws.

Estimates to be compiled.
R. S., sec. 3669, p. 722.

Sec. 211. The powers and duties relating to the compiling of estimates now conferred and imposed upon the Division of Bookkeeping and Warrants of the office of the Secretary of the Treasury are transferred to the Bureau.

Information to Congress when requested.

Sec. 212. The Bureau shall, at the request of any committee of either House of Congress having jurisdiction over revenue or appropriations, furnish the committee such aid and information as it may request.

Departments, etc., to furnish information to Bureau.
Access to records, etc., for examination.

Sec. 213. Under such regulations as the President may prescribe, (1) every department and establishment shall furnish to the Bureau such information as the Bureau may from time to time require, and (2) the Director and the Assistant Director, or any employee of the Bureau when duly authorized, shall, for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment.

Budget officers of departments, etc., to prepare estimates thereof.

Sec. 214. (a) The head of each department and establishment shall designate an official thereof as budget officer therefor, who, in each year under his direction and on or before a date fixed by him, shall prepare the departmental estimates.

Supplemental, etc., estimates.

(b) Such budget officer shall also prepare, under the direction of the head of the department or establishment, such supplemental and deficiency estimates as may be required for its work.

Revision and submission by heads of departments, etc.
Preparation in case of failure.

Sec. 215. The head of each department and establishment shall revise the departmental estimates and submit them to the Bureau on or before September 15 of each year. In case of his failure so to do, the President shall cause to be prepared such estimates and data as are necessary to enable him to include in the Budget estimates and statements in respect to the work of such department or establishment.

Form, etc., of estimates to be prescribed.

Sec. 216. The departmental estimates and any supplemental or deficiency estimates submitted to the Bureau by the head of any department or establishment shall be prepared and submitted in such form, manner, and detail as the President may prescribe.

Appropriation for establishing, etc., Bureau.

Sec. 217. For expenses of the establishment and maintenance of the Bureau there is appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $225,000, to continue available during the fiscal year ending June 30, 1922.

Title III.—General Accounting Office.

General Accounting Office.
Created as an independent establishment, under Comptroller General.
Offices of Comptroller of the Treasury and Assistant, abolished.
Personnel, records, equipment, etc., assigned to General Accounting Office.
Seal of Office.

Sec. 301. There is created an establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the General Accounting Office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office.

Comptroller General and Assistant to be appointed.
Salaries.
Duties of Assistant.

Sec. 302. There shall be in the General Accounting Office a Comptroller General of the United States and an Assistant Comptroller General of the United States, who shall be appointed by the President with the advice and consent of the Senate, and shall receive salaries of $10,000 and $7,500 a year, respectively. The Assistant Comptroller General shall perform such duties as may be assigned to him by the Comptroller General, and during the absence or incapacity of the Comptroller General, or during a vacancy in that office, shall act as Comptroller General.

Tenure of office, etc.

Sec. 303. Except as hereinafter provided in this section, the Comptroller General and the Assistant Comptroller General shall hold

Method and sole causes for removal specified.

office for fifteen years. The Comptroller General shall not be eligible for reappointment. The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any Comptroller General or Assistant Comptroller General removed in the manner herein provided shall be ineligible for reappointment to that office. When a Comptroller General or Assistant Comptroller General attains the age of seventy years, he shall be retired from his office.

Reappointment forbidden.

Age retirement.

Duties of Comptroller of the Treasury, the Auditors, and of personal ledger accounts by Bookkeeping, etc., Division, vested independently in Accounting Office.

Sec. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

Finality of certified balances.

Revision of auditors' settlements after July 1, 1921, discontinued.

Postal service.

Bureau of Accounts, Post Office Department, created for administrative examination of accounts.

Comptroller for, to be appointed.

The administrative examination of the accounts and vouchers of the Postal Service now imposed by law upon the Auditor for the Post Office Department shall be performed on and after July 1, 1921, by a bureau in the Post Office Department to be known as the Bureau of Accounts, which is hereby established for that purpose. The Bureau of Accounts shall be under the direction of a Comptroller, who shall be appointed by the President with the advice and consent of the Senate, and shall receive a salary of $5,000 a year. The Comptroller shall perform the administrative duties now performed by the Auditor for the Post Office Department and such other duties in relation thereto as the Postmaster General may direct. The appropriation of $5,000 for the salary of the Auditor for the Post Office Department for the fiscal year 1922 is transferred and made available for the salary of the Comptroller, Bureau of Accounts, Post Office Department. The officers and employees of the Office of the Auditor for the Post Office Department engaged in the administrative examination of accounts shall become officers and employees of the Bureau of Accounts at their grades and salaries on July 1, 1921. The appropriations for salaries and for contingent and miscellaneous expenses and tabulating equipment for such office for the fiscal year 1922, and all books, records, documents, papers, furniture, office equipment, and other property shall be apportioned between, transferred to, and made available for the Bureau of Accounts and the General Accounting Office, respectively, on the basis of duties transferred.

Duties to be performed.

Salary of Auditor transferred.

Vol. 41, p. 1260.

Transfer of personnel.

Appropriations transferred.

Vol. 41, pp. 1269, 1273.

Public accounts.

R. S., sec. 236, p. 39, amended.

Sec. 305. Section 236 of the Revised Statutes is amended to read as follows:

Settlement and adjustment thereof by General Accounting Office.

"Sec. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

General administrative laws applicable.

Sec. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. Copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the

Effect of copies of records, etc., as evidence.

General Accounting Office, when certified by the Comptroller General or the Assistant Comptroller General under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 882 and 886 of the Revised Statutes.

R. S., secs. 882, 886, p. 167.

Adjusted claims, etc., to be paid through disbursing officers.

Sec. 307. The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office, through disbursing officers of the several departments and establishments, instead of by warrant.

Specified duties transferred from Public Moneys Division to Bookkeeping, etc., Division.

Sec. 308. The duties now appertaining to the Division of Public Moneys of the Office of the Secretary of the Treasury, so far as they relate to the covering of revenues and repayments into the Treasury, the issue of duplicate checks and warrants, and the certification of outstanding liabilities for payment, shall be performed by the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury.

Administrative procedure for accounting, etc., to be prescribed.

Sec. 309. The Comptroller General shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States.

Offices of auditors abolished.

Personnel, etc., transferred to Accounting Office.

Sec. 310. The offices of the six auditors shall be abolished, to take effect July 1, 1921. All other officers and employees of these offices except as otherwise provided herein shall become officers and employees of the General Accounting Office at their grades and salaries on July 1, 1921. All books, records, documents, papers, furniture, office equipment, and other property of these offices, and of the Division of Bookkeeping and Warrants, so far as they relate to the work of such division transferred by section 304, shall become the property of the General Accounting Office. The General Accounting Office shall occupy temporarily the rooms now occupied by the office of the Comptroller of the Treasury and the six auditors.

Temporary office rooms assigned.

Appointment, etc., of employees by Comptroller General.

Sec. 311. (a) The Comptroller General shall appoint, remove, and fix the compensation of such attorneys and other employees in the General Accounting Office as may from time to time be provided for by law.

Application of civil service laws.

(b) All such appointments, except to positions carrying a salary at a rate of more than $5,000 a year, shall be made in accordance with the civil-service laws and regulations.

Pay restrictions.

(c) No person appointed by the Comptroller General shall be paid a salary at a rate of more than $6,000 a year, and not more than four persons shall be paid a salary at a rate of more than $5,000 a year.

Assignment of duties.

(d) All officers and employees of the General Accounting Office, whether transferred thereto or appointed by the Comptroller General, shall perform such duties as may be assigned to them by him.

Authority of employees specially designated.

(e) All official acts performed by such officers or employees specially designated therefor by the Comptroller General shall have the same force and effect as though performed by the Comptroller General in person.

Regulations, etc., authorized.

(f) The Comptroller General shall make such rules and regulations as may be necessary for carrying on the work of the General Accounting Office, including rules and regulations concerning the admission of attorneys to practice before such office.

Comptroller General. Investigation by, of all matters relating to public funds.

Sec. 312. (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application

Recommendations by, to Congress to facilitate accurate rendition of accounts, etc.

For greater economy and efficiency in public expenditures.

of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

Special investigations, etc., when ordered by Congress or committees thereof.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

Special reports of violations of law by departments, etc.

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

Report if departmental examination and inspection of accounts adequate, etc.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

Information to Budget Bureau when requested.

(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time.

Departments to furnish information of their activities, etc.

Sec. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisions of section 291 of the Revised Statutes.

Access to records, etc.

Diplomatic emergencies excepted. R. S. sec. 291, p. 49.

Eligible list of accountants to be established.

Sec. 314. The Civil Service Commission shall establish an eligible register for accountants for the General Accounting Office, and the examinations of applicants for entrance upon such register shall be based upon questions approved by the Comptroller General.

Transfer of appropriations for offices herein abolished. Vol. 41, pp. 1268, 1269.

Sec. 315. (a) All appropriations for the fiscal year ending June 30, 1922, for the offices of the Comptroller of the Treasury and the six auditors, are transferred to and made available for the General Accounting Office, except as otherwise provided herein.

Changes in transferred personnel, etc., authorized during fiscal year.

(b) During such fiscal year the Comptroller General, within the limit of the total appropriations available for the General Accounting Office, may make such changes in the number and compensation of officers and employees appointed by him or transferred to the General Accounting Office under this Act as may be necessary.

Proportionate share of appropriations for rent, contingent expenses, etc., Treasury Department, 1922, transferred.

(c) There shall also be transferred to the General Accounting Office such portions of the appropriations for rent and contingent and miscellaneous expenses, including allotments for printing and binding, made for the Treasury Department for the fiscal year ending June 30, 1922, as are equal to the amounts expended from similar appropriations during the fiscal year ending June 30, 1921, by the Treasury Department for the offices of the Comptroller of the Treasury and the six auditors.

Appropriations made available for Accounting Office.

(d) During the fiscal year ending June 30, 1922, the appropriations and portions of appropriations referred to in this section shall be available for salaries and expenses of the General Accounting Office, including payment for rent in the District of Columbia, traveling expenses, the purchase and exchange of law books, books of reference, and for all necessary miscellaneous and contingent expenses.

Sess. I. Ch. 18. 1921.
In such regular report, Congress is in session, he shall economy or efficiency in
and reports as shall be any committee of either appropriations, or expendi- at the request of any office to furnish the com- request.
specially report to Congress department or estab-
upon the adequacy and nation of accounts and establishments and upon mental inspection of the
relating to expenditures and it may request from time
ments shall furnish to the ding the powers, duties, es, and methods of busi- time to time require of any of his assistants or shall, for the purpose of the right to examine any such department or this section shall not the provisions of section
shall establish an eligible Accounting Office, and the such register shall be troller General.
fiscal year ending June 30, the Treasury and the six available for the General ded herein.
r General, within the the General Accounting and compensation of transferred to the General necessary.
General Accounting Office contingent and mis- printing and binding, year ending June 30, similar appropria- 21, by the Treasury the Treasury and
1922, the appropria- in this section shall General Accounting District of Columbia, of law books, books and contingent

Employees allowed additional pay of $240 a year. Vol. 41, p. 1308.

Sec. 316. The General Accounting Office and the Bureau of Accounts shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed civilian employees under the provisions of section 6 of the Legislative, Executive, and Judicial Appropriation Act for the fiscal year ending June 30, 1922, if otherwise entitled thereto.

Transfer of department, etc., employees permitted until June 30, 1922. Vol. 34, p. 449.

Sec. 317. The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal year ending June 30, 1922, to the transfer of employees to the General Accounting Office.

Immediate effect of Act. Proviso. Accounting Office, etc., on July 1, 1921.

Sec. 318. This Act shall take effect upon its approval by the President: *Provided*, That sections 301 to 317, inclusive, relating to the General Accounting Office and the Bureau of Accounts, shall take effect July 1, 1921.

Approved, June 10, 1921.

June 10, 1921. [H. R. 89.] [Public, No. 14.]

CHAP. 19.—An Act For the public sale of post-office site on the west side of South Main Street, in the city of Bethlehem, Pennsylvania.

Bethlehem, Pa. Public building at, to be sold.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby, authorized and directed to sell at public sale the post-office site and buildings thereon erected, situate on the west side of South Main Street, in the city of Bethlehem, Pennsylvania, after proper advertisement, and at such time and upon such terms as he may deem for the best interests of the United States, for a sum not less than $20,000, and to execute and deliver to the purchaser the usual quit-claim deed therefor, and to deposit the proceeds derived from such sale in the Treasury of the United States as a miscellaneous receipt.

Deposit of proceeds.

Approved, June 10, 1921.

June 10, 1921. [H. R. 6367.] [Public, No. 15.]

CHAP. 20.—An Act To amend section 407 of the Transportation Act of 1920.

Transportation Act, 1920. Vol. 41, p. 482, amended.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 407 of the Transportation Act of 1920 be, and it is hereby, amended by adding thereto a new paragraph designated as paragraph (9), as follows:

Telephone companies permitted to consolidate, etc.

"(9) Upon application of one or more telephone companies for authority to consolidate their properties or a part thereof into a single company, or for authority for one or more such companies to acquire the whole or any part of the property of another telephone company or other telephone companies or the control thereof by the purchase of securities or by lease or in any other like manner, when such consolidated company would be subject to this Act, the commission shall fix a time and place for a public hearing upon such application and shall thereupon give reasonable notice in writing to the governor of each of the States in which the physical property affected, or any part thereof, is situated, and to the State public service commission or other regulatory body, if any, having jurisdiction over telephone companies, and to such other persons as it may deem advisable. After such public hearing, if the commission finds that the proposed consolidation, acquisition, or control will be of advantage to the persons to whom service is to be rendered and in the public interest, it shall certify to that effect; and thereupon any Act or Acts of Congress making the proposed transaction un-

Public hearing of applications.

Certificate authorizing.

§ 703. Comptroller General and Deputy Comptroller General

(a)(1) The Comptroller General and Deputy Comptroller General are appointed by the President, by and with the advice and consent of the Senate.

(2) When a vacancy occurs in the office of Comptroller General or Deputy Comptroller General, a commission is established to recommend individuals to the President for appointment to the vacant office. The commission shall be composed of—

(A) the Speaker of the House of Representatives;

(B) the President pro tempore of the Senate;

(C) the majority and minority leaders of the House of Representatives and the Senate;

(D) the chairmen and ranking minority members of the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House; and

(E) when the office of Deputy Comptroller General is vacant, the Comptroller General.

(3) A commission established because of a vacancy in the office of the Comptroller General shall recommend at least 3 individuals. The President may ask the commission to recommend additional individuals.

(b) Except as provided in subsection (e) of this section, the term of the Comptroller General is 15 years. The Comptroller General may not be reappointed. The term of the Deputy Comptroller General expires on the date an individual is appointed Comptroller General. The Deputy Comptroller General may continue to serve until a successor is appointed.

(c) The Deputy Comptroller General—

(1) carries out duties and powers prescribed by the Comptroller General; and

(2) acts for the Comptroller General when the Comptroller General is absent or unable to serve or when the office of Comptroller General is vacant.

(d) The Comptroller General shall designate an officer or employee of the General Accounting Office to act as Comptroller General when the Comptroller General and Deputy Comptroller General are absent or unable to serve or when the offices of Comptroller General and Deputy Comptroller General are vacant.

(e)(1) A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by—

(A) impeachment; or

(B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—

(i) permanent disability;

(ii) inefficiency;

(iii) neglect of duty;

(iv) malfeasance; or

(v) a felony or conduct involving moral turpitude.

(2) A Comptroller General or Deputy Comptroller General removed from office under paragraph (1) of this subsection may not be reappointed to the office.

(f) The annual rate of basic pay of the—

(1) Comptroller General is equal to the rate for le II of the Executive Schedule; and

(2) Deputy Comptroller General is equal to the rate for level III of the Executive Schedule.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 888.)

Historical and Revision Notes

Revised Section	Source (U.S. Code)	Source (Statutes at Large)
703(a)(1)	31:42(a) (1st sentence words after comma).	June 10, 1921, ch. 18, § 302(a) (1st sentence words after 1st comma, last sentence), 42 Stat. 23. Apr. 3, 1980, Pub.L. 96-226, § 104(a), 94 Stat. 314
703(a)(2), (3)	31:42(b)	June 10, 1921, ch. 18, 42 Stat. 20, § 302(b); added Apr. 3, 1980, Pub.L. 96-226, § 104(a), 94 Stat. 314
703(b)	31:43 (1st par. 1st, 2d sentence)	June 10, 1921, ch. 18, § 303 (1st par.), 42 Stat. 23. Apr. 3, 1980, Pub.L. 96-226, § 104(b)(1), 94 Stat. 315.
703(c)	31:42(a) (last sentence)	
703(d)	31:43a	June 27, 1944, ch. 286, § 101 (last par. on p. 371), 58 Stat. 371.
703(e)	31:43 (1st par. 3d-last sentences)	
703(f)	31:42a	Aug. 14, 1964, Pub.L. 88-426, § 203(a), (b), 78 Stat. 415; Dec. 16, 1967, Pub.L. 90-206, § 219(1), 81 Stat. 639; restated Aug. 9, 1975, Pub.L. 94-82, § 204(b), 89 Stat. 421.

Explanatory Notes

In subsections (a)(1), (b), (d), and (e), the word "Deputy" is substituted for "Assistant" because of section 101 of the Act of July 9, 1971 (Pub.L. 92-51, 85 Stat. 143).

In subsection (a)(1), the words "The Comptroller General and Deputy Comptroller General" are added because of the restatement. The words "by and" are added for consistency. The words "and shall receive salaries of $10,000 and $7,500 a year, respectively" in section 302(a) (1st sentence words after 2d comma) of the Budget and Accounting Act, 1921 (ch. 18, 42 Stat. 23), are omitted as superseded by subsection (f) of this section.

In subsection (a)(2), before clause (A), the words "after April 3, 1980" are omitted as executed. In clause (E), the words "of the United States" are omitted as surplus.

In subsection (a)(3), the words "because of a vacancy in the office of the Comptroller General" are substituted for "under paragraph (1)" for clarity. The word "recommend" is substituted for "submit" and "submitted" for consistency. The words "to the President for consideration the names of", "for the Office of Comptroller General", and "within his discretion" are omitted as surplus.

In subsection (b), the words "the term of . . . is 15 years" are substituted for "shall hold office for fifteen years" for consistency. The words "eligible for" are omitted as surplus. The words "the term of . . . expires on" are substituted for "shall hold office from the date of his appointment until" to eliminate unnecessary words and for consistency. The words "to fill a vacancy in the Office of" are omitted as surplus.

In subsection (c), the words "carries out duties and powers prescribed" are substituted for "perform such duties as may be assigned" for consistency. The words "to him" are omitted as surplus.

In subsection (d), the words "officer or" are added for consistency in the revised title. The text of section 101 (last par. on p. 371 words before colon) of the Act of June 27, 1944 (ch. 286, 58 Stat. 371), is omitted as expired.

In subsection (e)(1), before clause (A), the words "from his office" are omitted as surplus. In clause (A), the words "and for no other cause and in no other manner" are omitted as surplus. In clause (B), before subclause (i), the words "opportunity for a" are added for consistency. The words "guilty of" are omitted as surplus. In subclause (i), the word "disability" is substituted for "incapacitated" for consistency in the chapter and with title 5 [Title 5, Government Organization and Employees]. In subclause (iv), the words "in office" are omitted as surplus.

In subsection (e)(2), the words "from office" are added for clarity.

U.S. Constitution
Art. 2, § 2, cl. 2

[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, providing two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

85-1378
85-1379

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

Nos.

CHARLES A. BOWSHER, COMPTROLLER GENERAL
OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE HOUSE OF
REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT MOTION (1) TO CONSOLIDATE APPEALS, (2) TO
EXPEDITE CONSIDERATION OF JURISDICTIONAL STATEMENTS,
(3) TO ESTABLISH EXPEDITED SCHEDULE FOR BRIEFING AND
ARGUMENT IF PROBABLE JURISDICTION IS NOTED, AND (4) TO
PERMIT INITIAL FILING OF TYPEWRITTEN JURISDICTIONAL
STATEMENTS AND RESPONSES AND REPLY BRIEFS

All parties to these appeals from the judgment of the United States District Court for the District of Columbia declaring unconstitutional provisions of the Balanced Budget and Emergency Deficit Control Act of 1985 move for adoption of a schedule and for other procedural actions that will permit the Court to expedite its consideration in order to dispose of the appeal during the Court's current Term. This

expedited treatment is justified by the text of the judicial review provisions contained in the Deficit Control Act, the interests of all parties, and the paramount national interest in a timely and orderly resolution of the constitutionality of the Act.1/

Consolidation of Appeals

This motion accompanies the jurisdictional statement filed today by the Comptroller General of the United States in docketing his appeals from the district court's February 7, 1986 judgment declaring provisions of the Deficit Control Act unconstitutional. The United States Senate and the Speaker and Bipartisan Leadership Group of the United States House of Representatives are each filing parallel jurisdictional statements in their independent appeals from the same judgment of the district court.2/ These jurisdictional statements present a single, substantively identical constitutional question. Accordingly, in the interest of judicial economy, the parties move for the consolidation of all appeals.

Grounds for Expedition

Because Congress anticipated immediate challenges to the constitutionality of the Act, Congress included in the Act a provision, section 274, governing judicial review of these claims. Subsection (c) of this section provides that

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1/ In order to permit the Court to consider this joint motion on an expedited basis, the parties move for leave to file this motion in typewritten form.

2/ The district court entered judgment in two cases, which it had consolidated for briefing and argument, Representative Mike Synar v. United States of America, C.A. No. 85-3945, and National Treasury Employees Union v. United States of America, C.A. No. 85-4106. The jurisdictional statements filed in the appeals from the judgment in the former case also cover the appeals from the judgment in the latter. See Sup. Ct. R. 10.6.

it is "the duty of ... the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a)." These appeals require expedited treatment because Representative Synar brought his complaint under subsection (a)(1), which authorizes members of Congress to bring actions seeking declaratory and injunctive relief on the ground that a presidential order that might be issued under the automatic reduction mechanism of the Act violates the Constitution. The action of the National Treasury Employees Union, which is also a subject of these appeals, see note 2 supra, was brought under subsection (a)(2), which permits actions by "any ... person adversely affected by any action taken under this title ... for declaratory judgment and injunctive relief concerning the constitutionality of this title."

Expedited treatment of these appeals would further the interests of all parties. First, the plaintiffs cannot obtain any relief until the Court finally disposes of the appeals. The district court declared the automatic deficit reduction process in the Act unconstitutional and the President's February 1, 1986 sequestration order without legal force and effect, but stayed the effect of its judgment during e pendency of any appeals from the judgment.3/ Second, the executive and legislative branches have a strong interest in an expeditious determinination of the constitutionality of

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3/ This stay was required by section 274(e) of the Act, which provides that "[n]o order of any court granting declaratory or injunctive relief from the order of the President ... shall take effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has entered its final order disposing of such action."

the Act. As the conference committee that reported the final version of the Act to the Congress explained, "The Conferees want any constitutional issues to be decided as promptly as possible. If any part of the Act is not constitutional, it is in the interest of everyone in the executive and legislative branches as well as the public in general, to know this as promptly as possible." H.R. Rep. No. 433, 99th Cong., 1st Sess. 99-100 (1985). Accord 21 Weekly Comp. Pres. Doc. 1490, 1491 (Dec. 16, 1985) (signing statement of Pres. Reagan) ("It is my hope that these outstanding constitutional questions can be promptly resolved.").

The public interest strongly militates in favor of expedited resolution of these appeals. The district court's judgment invalidated both the automatic trigger mechanism under the Act and the first use of that mechanism on February 1, 1986 to sequester from outlay $11.7 billion of budgeted funds during this fiscal year. However, because the court stayed the legal effect of its order, this government-wide budget sequestration will take effect pursuant to the Act on March 1, 1986. The propriety and efficacy of this major reduction in government spending will remain uncertain until the Court completes its consideration of these appeals. Expedited consideration of the appeals is justified to reduce the impact of this instability as much as is possible.

The timing of the federal budget cycle under the Act provides an especially compelling basis for the Court to expedite the appeals in order to provide a final disposition of the constitutionality of the Act during its current Term. Under the automatic trigger mechanism contained in the Act, the Directors of the Office of Management and Budget and the Congressional Budget Office must submit a joint report on

August 20, 1986, projecting the size of the federal deficit for fiscal year 1987. The Act then requires the Comptroller General to submit a similar report to the President on August 25, 1986. Depending upon Congress' interim success in legislating a federal budget for fiscal year 1987 that meets the maximum deficit target provided in the Act, these reports may be followed by a second presidential sequestration order on September 1, 1986. Under the Act the President's order, if one is required to be issued, would trigger budget reductions effective on October 1, 1986. The public interest will be served by having the Court's judgment upon the constitutionality of the automatic mechanism in the Deficit Reduction Act in advance of the beginning of the fiscal year 1987 sequestration cycle this summer.

The Court historically expedites cases in circumstances such as these, when expedition is required to further national goals of overriding importance. _See, e.g._, _Dames & Moore v. Regan_, 452 U.S. 932, 933 (1981) (granting motion to expedite consideration of petition for writ of certiorari, certiorari, and request to expedite schedule); _Buckley v. Valeo_, 424 U.S. 213 (1976) (jurisdictional statement filed Sept. 19, 1975, probable jurisdiction noted Oct. 6, 1975, argument held Nov. 10, 1975); _United States v. Nixon_, 417 U.S. 927 (1974) (granting certiorari and motion for expedited schedule). Accordingly, the Court should expedite the disposition of these appeals.

Submission of Jurisdictional Statements

The parties jointly move for expedited consideration of the jurisdictional statements and responses. The three appellants are filing their jurisdictional statements on February 18, 1986, and the appellees intend to file their

responses on February 19, 1986. To permit these expedited filings, the parties move for leave to file their jurisdictional statements and responses initially in typewritten form and subsequently to file the statements and responses in standard typographic printed form. The Comptroller General requests leave to file the appendix to his jurisdictional statement, containing the opinion and order below and the constitutional and statutory provisions involved, in typewritten form and to print the appendix to the jurisdictional statement only if the Court does not note probable jurisdiction. If the Court notes probable jurisdiction, the parties move for permission to reproduce the district court's opinion and the constitutional and statutory provisions involved in printed form as part of the joint appendix to be filed with appellants' opening briefs on the merits, in lieu of printing them as an appendix to the jurisdictional statements.

Alignment of the Parties

The three intervenor-defendants below -- the Comptroller General, the United States Senate, and the Speaker and Bipartisan Leadership of the House of Representatives -- are the appellants in this Court. They seek reversal of the judgment of the district court invalidating the Deficit Control Act. The plaintiffs and defendant below -- Representatives Mike Synar, et al., the National Treasury Employees Union, and the United States -- are appellees seeking affirmance or vacation of the court's judgment.

However, beyond that fact, the alignment of the parties is less simple. First, if the Court notes probable jurisdiction, the plaintiffs-appellees intend to present as an alternative ground for affirmance other constitutional

arguments relating to the scope of the Act's delegation of authority, as well as a separation of powers argument based on the participation of the Congressional Budget Office in the process, both of which were rejected by the district court. The defendant United States will join the intervenor-defendants, who are defending the constitutionality of the Act against these challenges. Second, assuming plenary review is granted, the defendant United States intends to challenge the portion of the district court's judgment granting standing to one or both of the plaintiffs. Hence, while the plaintiffs and the United States are nominally appellees, they are in conflict on several fundamental questions. The proposed schedule for filing of briefs and the request for additional argument time reflects this situation concerning the parties' alignment.

Expedited Schedule for Briefing and Argument

In the event that the Court notes probable jurisdiction, the parties move for adoption of an expedited schedule for litigating these appeals, requiring briefs to be filed in the Clerk's office by 3:00 p.m. and served upon all counsel by hand by 5:00 p.m. on the following dates:

Appellants' opening briefs	March 19, 1986
Appellees' responsive briefs	April 9, 1986
Appellants' reply briefs; and appellees' reply briefs responding solely to briefs of other appellees on issues of standing, delegation, and the role of the Congressional Budget Office	April 16, 1986

The purpose for providing a limited right of reply to appellees is that the United States may wish to reply to the delegation and standing arguments presented by the plaintiffs-appellees, and the plaintiffs-appellees may wish to reply to the delegation and standing arguments presented by the United States. Because of the limited time between receipt of appellees' responsive briefs and the time for filing reply briefs, all parties move for leave to file their reply briefs initially in typewritten form on April 16 with printed submissions to follow on April 19.

Oral Argument

In the event that probable jurisdiction is noted, the parties request that oral argument be scheduled on April 23, 1986, or as soon thereafter as the Court's calendar permits. The parties move that the Court allot two hours to hear oral argument in these appeals. The significance of the constitutional question presented by the appeals and the magnitude of the impact of the resolution of that question merit the provision of two hours to hear the appeals. Compare Dames & Moore v. Regan, 452 U.S. 959 (1981) (allotting two hours for oral argument); Buckley v. Valeo, 423 U.S. 820 (1975) (arising under a comparable statutory provision for expedited review and allotting four hours for oral argument); United States v. Nixon, 417 U.S. 927 (1974) (allotting two hours for oral argument). In addition to the importance of the constitutional question decided by the district court, the differences between the parties on the issues of plaintiffs' standing and the constitutional legitimacy

of the delegation contained in the Act accentuate the need for two hours for oral argument.[4/]

Conclusion

For the reasons discussed above, the parties jointly move for the following procedural actions to expedite consideration of these appeals:

1. Leave to file this motion in typewritten form.

2. Consolidation of all appeals.

3. Leave to file jurisdictional statements and responses initially in typewritten form, with printed submissions to follow.

4. Leave to file appendix to jurisdictional statements initially in typewritten form, with printed submission to follow, as part of joint appendix if probable jurisdiction is noted, and independently if it is not.

5. Expedited consideration of jurisdictional statements.

6. Adoption of expedited schedule for briefing and oral argument.

7. Leave to file reply briefs initially in typewritten form, with printed submissions to follow.

8. Allotment of two hours for oral argument.

4/ The parties anticipate filing a motion at a future time to permit divided argument, as in Buckley v. Valeo.

Counsel for all other parties have authorized Michael Davidson, counsel for the appellant United States Senate, to affix their signatures to this motion.

Respectfully submitted,

Alan B. Morrison /MS

Alan B. Morrison
Public Citizen Litigation Group
2000 P St., N.W., Suite 700
Washington, D.C. 20036
(202) 785-3704

Attorney for Appellees Mike Synar, Member of Congress, et al.

Lloyd N. Cutler /MS

Lloyd N. Cutler
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6100

Attorney for Appellant Comptroller General

Charles Fried /MS

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2201

Attorney for Appellees United States

Michael Davidson

Michael Davidson
Senate Legal Counsel
642 Hart Senate Office Building
Washington, D.C. 20510
(202) 224-4435

Attorney for Appellant United States Senate

Lois G. Williams /MS

Lois G. Williams
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006
(202) 785-4411

Attorney for Appellee National Treasury Employees Union

Steven R. Ross /MS

Steven R. Ross
General Counsel to the Clerk
House of Representatives
H-105 The Capitol
Washington, D.C. 20515
(202) 225-9700

Attorney for Appellants Thomas P. O'Neill, Jr., Speaker of the House of Representatives, et al.

Dated: February 18, 1986

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served by hand delivery on February 18, 1986, with a copy of the Joint Motion (1) to Consolidate Appeals, (2) to Expedite Consideration of Jurisdictional Statements, (3) to Establish Expedited Schedule for Briefing and Argument if Probable Jurisdiction is Noted, and (4) to Permit Initial Filing of Typewritten Jurisdictional Statements and Responses and Reply Briefs.

Lloyd N. Cutler
Wilmer, Cutler & Pickering
1666 K Street, N.W.
Washington, D.C. 20036

Attorney for Appellant Comptroller General

Steven R. Ross.
General Counsel to the Clerk
U.S. House of Representatives
H-105 The Capitol
Washington, D.C. 20515

Attorney for Appellants
Thomas P. O'Neill, Jr., Speaker of the House of Representatives, et al.

Alan B. Morrison
Public Citizen Litigation Group
2000 P St., N.W., Suite 700
Washington, D.C. 20006

Attorney for Appellees
Mike Synar, Member of Congress, et al.

Charles Fried
Solicitor General
Department of Justice
Washington, D.C. 20530

Attorney for Appellee
United States

Lois G. Williams
National Treasury Employees Union
1730 K Street, N.W.
Washington, D.C. 20006

Attorney for Appellee
National Treasury Employees Union

Michael Davidson

Dated: February 18, 1986

4 4 4

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, Comptroller General of the United States,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, *et al.*,
Appellants,

v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

MEMORANDUM OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET. AL.*, IN RESPONSE TO JURISDICTIONAL STATEMENTS

Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees

CASILLAS PRESS INC. - 1717 K STREET NW WASHINGTON DC - 223-1220

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v.

MIKE SYNAR, Member of Congress, *et al.,*
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, Member of Congress, *et al.,*
Appellees.

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, *et al.,*
Appellants,

v.

MIKE SYNAR, Member of Congress, *et al.,*
Appellees.

MEMORANDUM OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET. AL.*, IN RESPONSE TO JURISDICTIONAL STATEMENTS

On February 18, 1986, three jurisdictional statements were filed by appellants Charles Bowsher, Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership of the House of Representatives, all appealing from the Order and Judgment entered by the three-judge court of the United States District Court for the District of Columbia on February 7, 1986. Appellees, Representative Mike Synar and eleven other members of the House of

Representatives, agree that this Court has jurisdiction over these appeals and that the questions presented are substantial. Accordingly, they agree that the Court should grant plenary review.

In finding that the trigger mechanism under the Balanced Budget and Emergency Deficit Control Act of 1985, Public Law 99-177 (the "Act"), was unconstitutional, the district court based its ruling on the fact that the delegation under the Act was made to a person subject to removal by Congress, and concluded that this delegation of an executive function to such a person violated principles of separation of powers. Appellees agree with that holding and will support it in this Court, although the principal defense of it will be made by the United States. Moreover, in the district court, appellees made two additional arguments that were not accepted below, but which they will argue in this Court pursuant to Rule 10.5 of the Rules of this Court.

1. Appellees intend to argue that the delegation here was unconstitutionally broad, regardless of whether the power was delegated to the Comptroller General or to an official who is concededly part of the Executive Branch. Unlike the delegations which this Court has upheld against similar challenges since *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935), this statute has several features which present a markedly different delegation issue. First, the driving engine of necessity—the inability of Congress to make hundreds or even thousands of individual decisions based on the particular circumstances of each case, which has led this Court to uphold broad delegations in other laws—is wholly lacking here. Not only has Congress previously made the very budget determinations that it is now delegating to three unelected officials (the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO"), and the Comptroller General), but it will continue to make them in the future. The difference is that under the Act the deliberations of these three officials, and not those of Congress, will determine the final spending figures in the budget. In short, the

only "necessity" that led to the Act was the necessity to avoid accountability for making spending reductions which were unpalatable to various constituents, a justification never before relied on to sustain a delegation of any kind, let alone one of this importance.

Second, the administrative determinations being made are hardly fact-finding in the ordinary sense of that term. Rather, they are highly judgmental predictions of the future course of the economy, on which Congressional budget decisions, not the administration of the laws, are ordinarily based. Moreover, there are no standards to be applied in making these predictions. Prior economic predictions issued by CBO and OMB to aid Congress and the President in making decisions about the budget cannot provide the necessary standards, since those predictions were used purely to give advice and were only one factor in the decision-making, whereas under the Act they will be the operative determinations that will decide the spending levels for the federal government.

Finally, the Act includes a provision, section 274(h), App. 118a, which is unprecedented in statutes creating broad delegations even approaching this: it completely insulates these key determinations from all judicial scrutiny. Not only does this underscore the essentially legislative nature of these predictions, but it results in the delegation of power to affect billions of dollars in federal spending, with not even the most minimal check on the exercise or nonexercise of such power. This factor and the others noted above form the principal bases for appellees' claim that the delegation here has so exceeded the limits upheld by this Court that it cannot stand, even if the power were given to the President himself.

2. Appellees also intend to argue that it is unnecessary for the Court to decide whether the delegation to the Comptroller General is impermissible under separation of powers principles, because the decision-making process established by the Act envisions a major substantive, non-advisory role for the Congressional Budget Office, which is admittedly an arm of the Congress. Thus, because the statutory scheme provides for a shared

administration of the law, involving both Executive and Legislative officials, the delegation impermissibly violates separation of powers principles, even if the Comptroller General were part of the Executive Branch.

On this issue, our principal dispute with both appellants and the United States is that they contend that the role of CBO (and, by necessary implication, that of OMB) is merely advisory, and hence the legislative status of CBO creates no constitutional difficulties. In our view the Act does far more than make CBO and OMB advisers to the Comptroller General. Instead, it creates a system which requires the close cooperation and joint effort of all three officials to produce the report on which the spending reductions are based. Coupled with the power of Congress to remove the Comptroller General, this statutory mechanism creates an improper role for the Legislative Branch in carrying out the Act, and thus violates principles of separation of powers.

For the foregoing reasons, the Court should note probable jurisdiction and consider all of the constitutional questions presented by the decision below.

Respectfully submitted,
Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, NW
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees
Mike Synar, Member of Congress, *et al.*

March 14, 1986
(Filed in typewritten form February 19, 1986)

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Nos. 85-1377, 85-1378, and 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-1377

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

No. 85-1378

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

No. 85-1379

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MEMORANDUM FOR THE UNITED STATES

Appellants contend that the district court erred in declaring that the automatic deficit reduction process established by the Balanced Budget and Emergency Deficit Control Act

of 1985, Pub. L. No. 99-177, is unconstitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress under 31 U.S.C. 703(e). In our view, the district court's conclusion that the Act is unconstitutional in this respect is correct. Nonetheless, we believe that the question is substantial and that plenary review by this Court is warranted.

It is therefore respectfully submitted that probable jurisdiction should be noted.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

DOJ-1986-02

Nos. 85-1377, 85-1378 and 85-1379

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL, *et al.*,
Appellants

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*

On Appeals from the United States District Court for the District of Columbia

MEMORANDUM OF THE NATIONAL TREASURY EMPLOYEES UNION IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENTS

LOIS G. WILLIAMS *
Director of Litigation
GREGORY O'DUDEN
Assistant Director of Litigation
ELAINE KAPLAN
Assistant Counsel
NATIONAL TREASURY EMPLOYEES UNION
1730 K Street, N.W., Suite 1101
Washington, D.C. 20006
202/785-4411

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

Whether the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act of 1985 violates the separation of powers doctrine because:

1. It grants unelected administrative officials discretion to determine whether and to what extent spending levels for a broad range of legislative programs should be altered, without providing an intelligible principle to confine their discretion, and without permitting judicial review of their method of exercising that discretion; and

2. It requires the Comptroller General, an official who is removable by Congress, to make determinations that automatically trigger changes in spending levels authorized under enacted legislation.

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Appellants

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MIKE SYNAR, MEMBER OF CONGRESS, *et al.*

On Appeals from the United States District Court for the District of Columbia

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MEMORANDUM OF THE NATIONAL TREASURY EMPLOYEES UNION IN RESPONSE TO APPELLANTS' JURISDICTIONAL STATEMENTS

OPINION BELOW

The opinion of the district court is not yet reported. It is set forth in the Appendix to the Jurisdictional Statement filed by the appellant Charles G. Bowsher, Comptroller General, at 1a-52a.

JURISDICTION

The jurisdiction of the district court was based on section 274(a)(1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, and the consolidated cases below were heard and determined by a three-judge court pursuant to section 274(a)(5) of the Act, App. 116a. The district court entered its final order on February 7, 1986. App. 51a.

This Court has jurisdiction over these appeals under 28 U.S.C. 1252 because the order of the district court holds that provisions of an Act of Congress are unconstitutional. The jurisdiction of this Court is also founded on section 274(b) of the Act, App. 116a-117a, which provides in part: "Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

INTRODUCTION AND STATEMENT

1. This case arose out of consolidated challenges to the automatic spending reduction mechanism of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037, brought by the National Treasury Employees Union and a group of Congressmen. Under the Act, the economic forecasts made by certain administrative officials result in automatic reductions in, and elimination of, appropriated funds for a broad range of legislative enactments.

The goal of the Act is to reduce the size of the federal deficit to zero by fiscal year 1991. To do so, the Act establishes a maximum deficit amount for each fiscal year between 1986 and 1991. Section 201(a)(1), App. 57a. Under the Act, the Office of Management and the Budget (OMB) and the Congressional Budget Office (CBO) are to issue a report each year, on August 20th, that determines anticipated revenues and outlays for the coming year, forecasts economic conditions, and then predicts whether and by how much the projected deficit will exceed the target deficit for the year. Section 251 (a)(1), (a)(2), App. 81a-82a. If the projected deficit exceeds the target by over 10 billion dollars, then OMB and CBO must specify the spending cuts in existing programs that must be made, in accordance with the for-

mula Congress has established, in order to meet the target deficit amount. Section 251(a)(2), App. 82a. Within five days, the Comptroller General reviews the report and issues his own. Section 251(b), App. 86a. Thereafter, on September 1st, the President must issue a sequestration order, implementing the cuts specified by the Comptroller General. Section 252(a)(1), App. 90a.[1]

Thus, under the Act, the CBO, OMB, and Comptroller General have the authority to make economic estimates and projections that will trigger automatic spending cuts in existing legislation without further review by Congress or the President. Significantly, the economic data, assumptions, and methodology used by the Comptroller General to arrive at his determination of the projected deficit are not subject to judicial review. Section 274(h), App. 118a.

2. Plaintiff-appellee, the National Treasury Employees Union (NTEU), is a federal sector labor organization that represents the interests of both active and retired federal employees by acting as their representative in collective bargaining, by lobbying Congress for favorable working conditions and benefits, and by litigating their individual and collective rights in court. NTEU's 9,000 retiree members are amongst the very first persons who have been immediately and adversely affected by the au-

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[1] In general, the Act establishes that the first cuts are effectuated by eliminating all automatic cost of living adjustments mandated by statute. Thereafter, the Act would cut other items in the budget that are not otherwise exempted, by a uniform percentage, until the target deficit is met. The Act leaves it to the Comptroller General to predict what the deficit will be and thereby whether and in what degree cuts will be necessary.

For fiscal year 1986, the Act provides that the President's sequestration order shall be issued February 1, and effective March 1. Section 252(a)(1), (6)(A), App. 90a, 93a. It includes several other special provisions for 1986, including a limit on the maximum amount of the sequestration order. Section 251(a)(3)(A)(ii), App. 82a.

tomatic spending reduction mechanism contained in the Balanced Budget Act. In accordance with the Act, the cost of living adjustments due these individuals under the Civil Service Retirement Act were temporarily suspended on January 1, 1986. Section 252(a)(6)(C), App. 90a. Thereafter, the COLAs were permanently eliminated for 1986 by virtue of the Comptroller General's report and resulting Presidential sequestration order issued February 1, 1986, and effective March 1.

3. NTEU filed this suit on December 31, 1985, to challenge the constitutionality of the mechanism that suspended the COLAs due its retiree/members under the Retirement Act. NTEU's action was consolidated with a suit filed by Representative Mike Synar and a group of Congressmen. The Congressmen's right to maintain that suit had been assailed on standing grounds by the United States, the nominal defendant in the case. All parties agreed, however, (and the court held), that NTEU had standing to assert the rights of its undeniably injured retiree/members, in accordance with *Warth* v. *Seldin*, 422 U.S. 490 (1975). App. 9a-11a.[2]

In the district court, on the merits, plaintiffs argued that the Act's automatic spending reduction mechanism violates the Constitutional provision vesting all legislative power in Congress. NTEU explained that in this Act, Congress and the President have conspired to abdicate their constitutional duty to legislate the nation's spending priorities, and that the Act impermissibly and in unprecedented fashion delegates legislative authority

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[2] The court ultimately rejected defendant and intervenors' arguments that the Congressional plaintiffs had suffered no injury in fact as a result of the Act. Applying the law of the D.C. Circuit, which "recognizes a personal interest by members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief," the district court ruled that the Congressional plaintiffs also have standing. App. 11a-13a.

to various unelected administrative officials, whose decisions and methods are explicitly insulated from judicial review. Secondly, plaintiffs contended (and defendant United States agreed), that to the extent Congress could delegate any authority here, it may not delegate it to the CBO, a Congressional agency, or the Comptroller General, an official who is removable by the Congress.

4. The three-judge district court ruled that the automatic spending reduction mechanism violates the separation of powers doctrine. App. 1a-50a. The court rejected plaintiffs' arguments that the enormous and unguided authority the Act gives to OMB, the CBO and the Comptroller General to alter existing legislation, on the basis of determinations and methodologies that are not subject to judicial review, violates the constitutional provision that vests all legislative powers in Congress. After reviewing the recent history of the "delegation" doctrine, and comparing the Act to other legislation that has been upheld against a challenge of unconstitutional delegation, the court concluded that Congress' delegation of authority to the CBO, OMB, and Comptroller General contained sufficient standards to confine their discretion, and was therefore valid. App. 13a-28a.

However, the court ruled that the role of the Comptroller General in the spending reduction mechanism violated separation of powers principles, a ground both plaintiffs and the United States had advanced. The court concluded that the powers the Act confers upon the Comptroller General are executive in nature. Citing this Court's decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), *Buckley* v. *Valeo*, 424 U.S. 1 (1976), and *INS* v. *Chadha*, 462 U.S. 919 (1983), the court concluded that the Comptroller General cannot exercise powers that are executive in nature, because he is removable by Congress, and because he lacks the necessary independence from Congress. App. 28a-50a. Giving such power over executive functions to Congress, the

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v.

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UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT UNITED STATES SENATE

MICHAEL DAVIDSON,*
Senate Legal Counsel.

KEN U. BENJAMIN, Jr.,
Deputy Senate Legal Counsel.

MORGAN J. FRANKEL,
Assistant Senate Legal Counsel.

642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

*Counsel of record

QUESTION PRESENTED

Whether it violates the principle of separation of powers for the Comptroller General, an independent officer of the United States appointed by the President for a statutory term of years by and with the advice and consent of the Senate, to perform the administrative tasks assigned to him by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, because a provision (now 31 U.S.C. 703(e)) of the Budget and Accounting Act of 1921 establishes a procedure for his removal for cause by an enactment in conformity with the Presentation Clause, particularly when that provision has never been used or tested and could be severed if necessary.

PARTIES IN THE DISTRICT COURT

The plaintiffs in Civil Action No. 85-3945, in addition to Representative Mike Synar, were Representatives Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Trafficant, Jr. The plaintiff in Civil Action No. 85-4106 was the National Treasury Employees Union.

The United States was the defendant, and the Senate, the Speaker and Bipartisan Leadership Group of the House of Representatives, and the Comptroller General were intervenors, in both actions. The individual House intervenors were Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott.

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v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANT UNITED STATES SENATE

OPINION BELOW

The opinion of the district court, J.A. 27-80, is not yet reported. The order of the district court granting declaratory relief is reprinted at J.A. 81-82.

JURISDICTION

The district court had jurisdiction under section 274(a) (1) and (2) of the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or the "Act"), Pub. L. No. 99-177, 99 Stat. 1037, 1098. J.A. 162-63. This Court has jurisdiction under 28 U.S.C. 1252 and section 274(b) of the Act, 99 Stat. 1098-99. J.A. 163.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Appointments Clause, article II, section 2, clause 2 of the Constitution. J.A. 92.

2. 31 U.S.C. 703 (a)(1) and (e), J.A. 101-02, which codify sections 302 and 303 of the Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20, 23-24. J.A. 92, 94.

3. Part C of the Deficit Control Act, 99 Stat. 1063-93, 2 U.S.C. 901-907. J.A. 109-61.

STATEMENT OF THE CASE

Upon the President's approval of the Deficit Control Act on December 12, 1985, its key provisions were immediately applicable to the present fiscal year, 1986, which had begun on October 1, 1985. Act, § 275(a)(1); J.A. 167. Later on December 12 Representative Synar filed an action challenging the Act's constitutionality; an amended complaint on December 19 added other House member plaintiffs. J.A. 9. Administrative implementation of the Act for this fiscal year culminated in the President's February 1, 1986 sequestration order. The litigation in the district court resulted in turn on February 7, 1986, in a declaratory order that the President's order was without legal force and effect. We first will describe the actions to implement the Act this fiscal year.

A. THE FEBRUARY 1, 1986 PRESIDENTIAL SEQUESTRATION ORDER

To achieve a balanced budget by fiscal 1991, the Act establishes a series of declining deficit ceilings. Act, § 201(a); J.A. 104. For fiscal 1987, which begins on October 1, 1986, through fiscal 1991, the Act establishes these ceilings prior to the President's annual budget message and

the Congress' consideration of appropriations bills. The Congress enacted parts A and B of the Act, 99 Stat. 1039–63, to facilitate adherence to these deficit ceilings through the regular budget process. The administrative deficit reduction mechanism in part C of the Act, J.A. 109–61, is a standby mechanism for fiscal years 1987–91 which will be used only if the amended budget process fails to adhere to the maximum deficit limits. Because Congress enacted the maximum deficit amount for fiscal 1986, $171.9 billion, after this year's budget had been substantially determined, it knew that the deficit reduction mechanism would not be a standby procedure for this fiscal year, but would be used. To avoid disruption of federal activities in the middle of the fiscal year, the Act fixes an $11.7 billion ceiling upon this year's required deficit reduction. Act, § 251(a)(3)(A)(ii), (b)(1); J.A. 110, 116. This ceiling applies if the estimated fiscal 1986 deficit reaches $191.9 billion. *See* 51 Fed. Reg. 1924 n.2.

On January 15 the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") submitted a joint report to the Comptroller General estimating the excess budget deficit for this fiscal year. Act, § 251(a); J.A. 109. Generally assuming "the continuation of current law in the case of revenues and spending authority," Act, § 251(a)(6)(A); J.A. 115, the Directors estimated the budgetary consequences of those assumptions on the basis of economic projections as of January 10.[1] The OMB Director estimated a $220.1 billion deficit for this year; the CBO Director estimated a $220.9 billion deficit. Because these estimates exceeded $191.9 billion, the Directors reported the allocation of $11.7 billion of reduced expenditures. 51 Fed. Reg. 1923–24.

The Directors divided the required deficit reduction equally between defense and nondefense programs, Act, § 251(a)(3)(B); J.A. 110; 51 Fed. Reg. 1929–30, and calculat-

[1] Act, § 251(a); J.A. 109. For fiscal year 1987, the Directors must estimate revenues and outlays as of August 15 and report on August 20, 1986, to the Comptroller General. *Id.*

ed the savings from eliminating designated automatic spending increases.[2] They attributed to both the defense and the nondefense sides of the budget one-half of the savings from elimination of indexed increases in retirement and disability programs, and attributed to the nondefense side smaller savings from elimination of other indexed increases. Act, § 251(a)(3)(D–F); J.A. 111–12; 51 Fed. Reg. 1929–30.

After accounting for the elimination of automatic spending increases, the Directors ascertained the amount by which budgetary authority in the remaining accounts must be reduced. First, they identified the accounts which are statutorily exempt from sequestration.[3] They also complied with the President's exemption of military personnel accounts.[4] The Directors next calculated the reductions from prescribed exceptions, limitations, and special rules for limited reductions of expenditures in specified nondefense programs.[5] After subtracting the nonde-

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[2] The Act eliminates all designated automatic spending increases, Act, § 257(1); J.A. 159, unless the savings exceed one-half of the total sequestration. Act, §251(a)(3)(C); J.A. 111. Elimination of all designated automatic spending increases this year will save slightly more than $1,038 million. Because this sum does not exceed one-half of this year's required $11.7 billion reduction, the Directors reported the need to cancel all designated automatic spending increases. 51 Fed. Reg. 1932–33.

[3] Exempt accounts include social security benefits, food stamps, aid to families with dependent children, child nutrition, other low-income programs, certain veterans' programs, interest on the national debt, and compensation to the President and Article III judges. Act, § 255; J.A. 143–48.

[4] 51 Fed. Reg. 2085–87. The Director of OMB had notified the Comptroller General and the Congress on January 10 that the President would exempt from sequestration most fiscal year 1986 military personnel appropriations. The President used his authority under the Act to exempt $63.1 billion, or 93 percent, of the fiscal 1986 appropriations for those accounts. Act, § 252(a)(2)(B); J.A. 126; 51 Fed. Reg. 1926.

[5] 51 Fed. Reg. 1931–36. The Act limits reductions in medicare and certain other health programs to one percent in fiscal year 1986 and two percent in subsequent years. Other special rules govern the guaranteed student loan, child support enforcement, and foster care and adoption assistance programs. Act, § 256; J.A. 148–59.

fense savings from these special rules, the Directors determined the amount of defense and nondefense budgetary resources which are subject to "uniform percentage" reduction. Act, § 251(a)(3)(F)(iv)(I), (d)(1); J.A. 113, 119. Averaging their calculations of budgetary resources subject to uniform reductions, Act, § 251(a)(5); J.A. 115, the Directors concluded that $109.3 billion in defense programs and $114.8 billion in nondefense programs are subject to uniform reduction this year. They divided $5,353 million, the amount remaining after deducting automatic spending increases attributed to defense, by the defense total, and $4,912 million, the amount remaining after deducting automatic spending increases attributed to nondefense and the savings from programs subject to special rules, by the nondefense total. These calculations produced a required uniform percentage reduction of 4.9 percent for defense programs and 4.3 percent for nondefense programs. 51 Fed. Reg. 1930–31.

The Directors applied the percentage reductions to defense and nondefense accounts. *Id.*, 1942–2336. They also applied the uniform percentage reduction to programs, projects, and activities within defense accounts, Act, § 251(a)(2); J.A. 109–10, adhering to the President's decision to shield from reduction certain defense programs such as the Strategic Defense Initiative. Act, § 252(a)(2)(C)(i); J.A. 127; 51 Fed. Reg. 2223. The Directors reported that they "were able to agree on the conceptual application of P.L. 99-177 to all budget accounts except one," *id.*, 1919, and submitted to the Comptroller General their legal question about the Act's application to the payment to the Washington Metropolitan Area Transit Authority for interest on its bonds, *id.*, 1940.

The Comptroller General submitted his Report to the President and the Congress ("C.G. Rep.") on January 21, 1986.[6] He appraised the accuracy of OMB's and CBO's

[6] Act, § 251(b), (e); J.A. 116, 123; 51 Fed. Reg. 2813. In future fiscal years the Comptroller General will report to the President on August 25. Act, § 251(b)(1); J.A. 116–17.

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economic forecasting, comparing their projections with those of leading private forecasters, C.G. Rep. at 35–46, and concluded: "[B]oth the OMB and CBO assumptions were within a reasonable range for fiscal year 1986. No alternative assumptions which we might adopt would result in a deficit of less than $191.9 billion, and any deficit exceeding this amount requires sequestering the maximum amount of $11.7 billion for fiscal year 1986." *Id.* at 2. The Comptroller General's principal change in the OMB–CBO report was the addition of $6.3 billion to the sequesterable defense program base. Neither OMB nor CBO had included prior-year unobligated balances in certain Procurement and Research, Development, Test, and Evaluation accounts, but the Comptroller General found no legal authority for exempting these balances from sequestration. *Id.* at 6. He also made several legally required adjustments in the sequesterable bases of several nondefense accounts, *id.* at 19–34, and addressed the legal issue left unresolved by the Directors about the Washington Metropolitan Area Transit Authority. The principal and interest of these bonds are guaranteed by the United States, and the Comptroller General decided that the appropriation for interest payments is not subject to sequestration, because it is an obligated balance within the meaning of the Act. *Id.* at 33.

On February 1 the President issued a sequestration order for fiscal year 1986 which cohered with the report of the Comptroller General in all respects. Act, § 252(a)(1), (3); J.A. 124, 128. The order became effective on March 1. S. Doc. No. 24, 99th Cong., 2d Sess. ix-xii (1986). The Act directs the President to apply the required reduction to

The district court granted motions after the January 10 hearing to supplement the record with the reports of the OMB-CBO Directors and the Comptroller General. J.A. 4. These lengthy public documents are not reprinted in the Joint Appendix, but copies have been lodged with the Court. The court also granted a motion to supplement the record with the President's sequestration order. J.A. 5. This order has been reprinted together with incorporated department and agency reports in a Senate document, S. Doc. No. 24, 99th Cong., 2d Sess. (1986), which has also been lodged with the Court.

programs, projects, and activities within nondefense accounts, and the President's order incorporated reports from the executive, legislative, and judicial branches applying the reduction to their programs, projects, and activities. *Id.* at xii, 1–1119. The President may accompany a sequestration order with a message to the Congress proposing alternative ways to reduce the deficit, Act, § 252(c); J.A. 134, but he did not recommend any alternatives. S. Doc. No. 24, *supra*, at ix.

B. THE DECISION OF THE DISTRICT COURT

The three-judge district court consolidated the House members' action with an action, J.A. 13, by the National Treasury Employees Union. The plaintiffs contended that Congress unconstitutionally delegated its legislative power when it created an administrative mechanism to reduce the annual deficit. They also contended that the Comptroller General's and CBO Director's responsibilities under the Act violate the separation of powers. The United States, the defendant in the district court, claimed that the Act abridges the separation of powers by conferring administrative authority on the Comptroller General. The Senate, the House, and the Comptroller General intervened to defend the Act.[7] The court heard argument on January 10 and issued its decision on February 7, 1986.

After finding that the plaintiffs have standing, J.A. 32–38, the district court dismissed their contention that the Act unconstitutionally delegates the appropriations power to administrative officials. It held that the appropriations power is not functionally distinguishable from other powers whose delegation has been sustained, particularly noting the delegation of taxing power upheld in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). J.A. 43–44. Neither, the court held, does the Act permit administrators to nullify or to override laws. In-

[7] Each House has the right to intervene to defend the Act's constitutionality. Act, § 274(a)(4); J.A. 163. *See* S. Res. 282, 99th Cong., 1st Sess.; 131 Cong. Rec. S18099 (Dec. 19, 1985) (directing intervention).

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stead, the Act is a form of "contingent legislation" in which the "Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required target figures." J.A. 46. After a "careful review," J.A. 47, of the Act's main provisions, the court found that "the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate 'intelligible principle' to guide and confine administrative decision-making." J.A. 50. It concluded that "[t]hrough specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.

The district court then considered the claim of the plaintiffs and the United States that the Act violates the separation of powers in assigning responsibilities to the Comptroller General,[8] focusing on a section of the Budget and Accounting Act of 1921 which provides that the Comptroller General is removable by a joint resolution of the Congress for specified causes after notice and hearing.[9] The court held that the effect of the Comptroller General's removability on the constitutionality of his

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[8] The district court rejected as "unconvincing" the plaintiffs' assertion that the Act in reality confers final authority on the Directors of OMB and CBO rather than on the Comptroller General. J.A. 55 n.18.

[9] The United States had also contended that the administrative functions under the Deficit Control Act may be delegated only to an officer who is removable at will by the President. For that reason it argued that the Deficit Control Act is unconstitutional because the Comptroller General is insufficiently dependent on the President. The district court decided, however, that "the only [objection] we find it necessary to address" was the claim that administrative powers under the Act "cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires." J.A. 55.

powers is ripe even though the Congress has never attempted to remove a Comptroller General. The court reasoned that "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." J.A. 57. Reaching the merits, the court held that the Deficit Control Act assigns the Comptroller General executive functions, J.A. 72–73, and that "congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws." J.A. 75. Rather than invalidate the removal provision, the court concluded that "executive powers . . . cannot constitutionally be exercised by an officer removable by Congress . . . and therefore the automatic deficit reduction process to which [those powers] are central cannot be implemented." J.A. 78. The court declared the President's February 1 sequestration order "without legal force and effect," and it stayed its judgment pending these appeals. J.A. 82.

SUMMARY OF ARGUMENT

1. Congress has determined that the nation's economic well-being requires a standby administrative mechanism to enforce adherence to annual deficit ceilings leading to a balanced budget by 1991. After extensive consideration Congress authorized the Comptroller General to issue the report that underlies the standby presidential sequestration mechanism. The Comptroller General, an appointee of the President under the Appointments Clause, is an Officer of the United States who may exercise "significant governmental duty . . . pursuant to a public law." *Buckley* v. *Valeo,* 424 U.S. 1, 141 (1976) (per curiam). The Budget and Accounting Act of 1921 demonstrates that Congress established the Comptroller General as an Officer of the United States so that it constitutionally could confer administrative duties upon him.

2. The district court focused upon a provision in the Budget and Accounting Act permitting removal of the Comptroller General for specified causes by enactment of

a joint resolution. The history of that Act refutes the court's presumption that the removal provision renders the Comptroller General subservient to Congress. The Congress intended that the Comptroller General serve as an independent officer, under the control of neither Congress nor the Executive branch. It provided the Comptroller General with a statutory mandate of independence by requiring that he perform his statutory duties "without direction from any other officer." J.A. 95. Congress enacted the removal provision not to control the Comptroller General's administrative duties, but to provide him with the greatest possible measure of independence short of Article III judges. The existence of a for-cause removal provision is consistent with the status of an independent officer. *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935).

3. The Court has never adjudicated a dispute over the separation of executive and legislative powers before the use of those powers rendered a decision necessary. This Court's Appointment Clause decisions, *e.g., Buckley* v. *Valeo,* removal decisions, *e.g., Myers* v. *United States,* 272 U.S. 52 (1926), and legislative veto decision, *INS* v. *Chadha,* 462 U.S. 919 (1983), all followed the exercise of the challenged power. The removal provision only establishes procedures by which the Congress could consider a future proposal to enact a joint resolution to remove a Comptroller General. Only the enactment of a joint resolution of removal, which is itself a law, would constitute an exercise of removal authority. If a proposal is ever made to exercise the authority to remove, Congress would need to consider the constitutionality of the removal action in light of this Court's decisions since the Budget and Accounting Act of 1921. The Court should not anticipate how the Congress would resolve that constitutional question by adjudicating the issue "in advance of the necessity of deciding it." *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

4. The history of the Budget and Accounting Act of 1921 and the Deficit Control Act of 1985 shows that Con-

gress both would have created the General Accounting Office in 1921, and would have conferred the duty to report excess deficits upon the Comptroller General in 1985, independently of the removal provision. The provision in 1921 for removal of the Comptroller General by joint resolution was secondary in importance to the need to institute an independent auditing and accounting function outside of the control of the Executive, and may be severed. *Accord INS* v. *Chadha*, 462 U.S. at 931–35 (severing legislative veto authority over suspension of deportations notwithstanding Congress' preference to retain control over delegated authority). Congress' delegation in 1985 of the duty to report excess deficits to the President under the Deficit Control Act did not depend upon the existence of the removal provision, which by then had been dormant for sixty-five years. The removal provision was never mentioned in the legislative history of the Deficit Control Act. The Congress selected the Comptroller General to report final excess deficit estimates precisely because of his longstanding record of independence. This Court should give effect to Congress' judgment that the nation's welfare requires the availability for five years of a standby administrative mechanism to assure deficit reduction.

ARGUMENT

I.

CONGRESS DETERMINED THAT THE PARTICIPATION OF THE COMPTROLLER GENERAL IS NECESSARY TO ACCOMPLISH THE PURPOSES OF THE DEFICIT CONTROL ACT

The Congress decided that the economic well-being of the nation requires three measures: the establishment of decreasing annual deficit ceilings leading to a balanced budget by fiscal year 1991; the revision of congressional procedures to achieve annual budgets within those statutory ceilings; and the creation of a five-year administrative mechanism to enforce adherence to spending limits. Except for the current fiscal year, the administrative

mechanism is a standby procedure that may never be used, but whose availability Congress judged vital to attaining the objectives of the Act. The strong expectation, expressed by a member of the Committee on the Budget, is that "we will reach [the goals of the Act] in a manner far different from what the [standby administrative mechanism] would require simply because the penalties for inaction will be so great, and the demands for a creative and sensitive response will be corrrespondingly great." 131 Cong. Rec. S12574 (Oct. 3, 1985) (Sen. Gorton). As Senator Gramm, a sponsor of the Act, remarked shortly before final passage, "The automatic cuts [of the standby administrative mechanism] are important—they are the disciplining agent—but those automatic cuts after this first year are going to occur only if we fail to do our job." *Id.*, S17389 (Dec. 11, 1985).

The administrative mechanism originated in the Senate, and initially would have charged OMB and CBO with the joint duty of reporting to the President whether the budget was expected to produce a deficit exceeding the ceiling for that fiscal year, and, if so, by what uniform percentage outlays would need to be reduced to comply with the deficit ceiling.[10] During the course of the House debate, constitutional objections were raised to the Senate provision for the participation of CBO in reporting excess deficits to the President jointly with OMB. A letter from Professor Tribe to Representative Synar focused that objection on the Congress' appointment of the Director of CBO. 131 Cong. Rec. H9609 (Nov. 1, 1985) ("[N]o-one who exercises power as an officer of the United States may be appointed by the legislative branch. *Buckley v. Valeo*, . . ."').[11] In response, the Senate amended its bill

[10] S. 1702, §4, 99th Cong., 1st Sess. (1985). The provisions of S. 1702 were adopted as an amendment to H.J. Res. 372, 99th Cong., 1st Sess. (1985), 131 Cong. Rec. S12988 (Oct. 9, 1985).

[11] In spite of this constitutional question, the House passed a bill which stipulated that the deficit and required expenditure reduction estimates would be reported to the President by CBO alone, after CBO

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to designate the Comptroller General, who is appointed by the President, as the officer whose report to the President triggers budget sequestration, and the House accepted this amendment.[12]

In delegating this authority to the Comptroller General, the Congress recognized that officer's longstanding record of independence. The Congress and the President shape budget priorities while enacting appropriations and revenue legislation. They have decided in the Deficit Control Act that if it is necessary to use the Act's administrative mechanism, the mechanism may not "alter the relative priorities in the Federal budget that are established by law." Act, § 252(e); J.A. 134. The selection of the Comptroller General, whose charter requires independence and neutrality, helps to effectuate this fundamental requirement.

The Congress selected the Comptroller General also because of his expertise in handling the government's financial accounts. Congress had previously "delegated to him a number of powers of nonlegislative character primarily to assist it in assuring the financial accountability of the executive agencies." F. Mosher, *The GAO: The Quest for Accountability in American Government* 242 (1979). Realizing that implementation of the Act's administrative mechanism would require the meticulous application of the required expenditure reduction across the government's many accounts, Congress concluded that the Comptroller General's familiarity with the accounts would enable him to perform the task with speed and accuracy.

Finally, and importantly, the Congress sought "to remove any constitutional cloud from this legislation." 131 Cong. Rec. S14911 (Nov. 6, 1985) (Sen. Gramm). The Comptroller General's role "corrected" the "constitutional issue [that] was raised about the involvement of CBO,"

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consulted with OMB. H.J. Res. 372, § 251, 99th Cong., 1st Sess. (1985), 131 Cong. Rec. H9590 (Nov. 1, 1985).

[12] 131 Cong. Rec. S14924 (Nov. 6, 1985); *id.*, H11903-04 (Dec. 11, 1985).

id., S14924, because, in the words of the chairman of the conference on the Act, "GAO—which indeed is an executive agency—has to certify the results of the CBO and the OMB," *id.*, S14659 (Nov. 1, 1985) (Sen. Packwood).[13] At issue in these appeals is Congress' judgment that the Comptroller General is constitutionally qualified to undertake the critical responsibilities that the Act reposes in him.

II.

THE COMPTROLLER GENERAL IS AN INDEPENDENT OFFICER OF THE UNITED STATES, WHO MAY PERFORM THE DUTIES ASSIGNED BY THE DEFICIT CONTROL ACT

A. The President's Appointment of the Comptroller General Renders Him an Officer of the United States

This Court established in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), that the manner of a public official's appointment determines whether he may exercise authority under the laws. The Court invalidated the Federal Election Commission's enforcement functions because four of its commissioners were appointed by Members of Congress. The Court reasoned that unless individuals are appointed by a method prescribed by the Appointments Clause, J.A. 92, they are not "Officers of the United States" under the Clause, and they cannot exercise "significant governmental duty . . . pursuant to a public law." 424 U.S. at 141.

The Comptroller General's appointment comports with the Appointments Clause. "The Comptroller General . . . [is] appointed by the President, by and with the advice and consent of the Senate." 31 U.S.C. 703(a)(1); J.A. 101.

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[13] *Accord id.*, S14666 (Sen. Hollings) ("GAO . . . is an executive body. It can make orders."). These identifications of GAO as an executive agency derive from permanent law. For the purpose of Title 5 of the United States Code, GAO is an "independent establishment," 5 U.S.C. 104, and "an independent establishment" is an "Executive agency," *id.*, 105.

The Court explicitly recognized in *Buckley* that the Comptroller General's appointment renders him an "Officer of the United States." Rejecting the Federal Election Commission's attempt to liken itself to the Comptroller General for precedential support, the Court distinguished the Comptroller General's status by pointing to his "appoint[ment] by the President in conformity with the Appointments Clause." 424 U.S. at 128 n.165. As an "Officer of the United States" the Comptroller General may constitutionally perform his assigned duties pertaining to the "administration and enforcement of the public law." *Id.* at 139.[14]

The legislative history of the Budget and Accounting Act of 1921, J.A. 92–100, demonstrates forcefully that Congress intended the Comptroller General to be an Officer of the United States under the Appointments Clause. Several initial versions of the Act envisioned an office headed by an appointee of the Congress.[15] The House Select Committee on the Budget focused extensively upon the appointment process in two weeks of hearings. The chairman, Representative Good, who was the principal author and floor manager of the Act, summed up the testimony as follows:

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[14] Attorney General Levi described to this Court the relationship between the manner of an officer's appointment and the officer's powers:

> [T]he members of the independent regulatory commissions are "Officers of the United States" within the meaning of Article II, Section 2 of the Constitution. They are appointed by the President and are confirmed by the Senate. *In consequence, they can share, much as cabinet officers share, in the power granted by Article II to execute the laws.*

Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae, Buckley v. Valeo,* at 121 n.78 (emphasis added). *Accord Ameron, Inc. v. U.S. Army Corps of Engineers,* 610 F. Supp. 750, 757; 607 F. Supp. 962, 972 (D.N.J. 1985), *appeals argued,* Nos. 85–5226 & 85–5377 (3d Cir. Oct. 29, 1985) (upholding Comptroller General's role in Competition in Contracting Act).

[15] *See, e.g.,* H.R. 551, § 2, 66th Cong., 1st Sess. (1919); H.R. 3738, § 1, 66th Cong., 1st Sess. (1919).

> [E]verybody who has appeared before the committee so far has thought that this position was one of such responsibility and that the officer holding it ought to have such powers that, in order that his functions might be effective, he would have to be an officer of the United States. Of course, if that is the case, [the Appointments Clause] would rather take from us the power to appoint.[16]

Accordingly, the committee rejected the proposals for congressional appointment.[17]

Over the next two years, the Congress grappled repeatedly with the proposed budget legislation before enacting the 1921 Act. Every version of the legislation proposed during this lengthy period of debate provided for the new accounting office to be headed by an Officer of the United States appointed in conformity with the Appointments Clause. Whenever the appointment question arose, Chairman Good reminded his colleagues that, to enable the Comptroller General to perform the functions being assigned, the legislation needed to conform to the mode of appointment prescribed by the Constitution for Officers of

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[16] *National Budget System: Supplement to Hearings Before the House Select Comm. on the Budget*, 66th Cong., 1st Sess. 691 (1919). Distinguished witnesses had told the committee that the President must retain the appointment power in order for the officer to perform the functions contemplated in the legislation. *See, e.g., id.* at 479 (former President Taft); *id.* at 644 (former War Secretary Stimson).

[17] H.R. Rep. No. 362, 66th Cong., 1st Sess. 9 (1919). Chairman Good consistently observed that under the Appointments Clause if the accounting officers were appointed by Congress, they "[c]learly . . . would not be officers of the Government of the United States." *National Budget System Hearings, supra* note 16, at 248; *id.* at 439 ("[I]t seems . . . he must be more than an officer of Congress. If he is to tell some other official of the Government what he can do and what he can not do, he must be an official of the United States.").

the United States.[18] The Congress has never deviated from that understanding.[19]

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[18] *See, e.g.*, 58 Cong. Rec. 7274 (1919) ("In order to make him an official of the United States it is necessary under the Constitution of the United States to place the appointing power in the President."); 59 Cong. Rec. 8611 (1920) (Rep. Good); *id.*, 8612:

> Mr. GOODYKOONTZ. Does not he think that the comptroller general would be rather an agent or a mere arm of Congress . . . and does not come within the category of general officers contemplated to be beyond the jurisdiction of Congress itself?
>
> Mr. GOOD. It was the opinion of the committee that framed the law that the officer we were creating here was an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution.

[19] The Congress confirmed that the Comptroller General is an Officer of the United States when it considered legislation in the 1970s to alter the means of the Comptroller's appointment. Recognizing that under *Buckley* his duties require that he be an Officer of the United States, the Congress rejected proposals to permit Congress either to appoint, or to develop a list of proposed nominees from which the President would be required to appoint, the Comptroller General. S. 2206, § 1, 94th Cong., 1st Sess. (1975); H.R. 12171, § 4, 95th Cong., 2d Sess. (1978). The Department of Justice testified that, because the General Accounting Office had a "number of responsibilities . . . that are really executive," the Comptroller General "has to be selected in a way consistent with the appointments clause of the Constitution." *GAO Legislation: Hearings on S. 1878 and S. 1879 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs,* 96th Cong., 1st Sess. 77 (1979).

Congress heeded "the constitutional objections to legislative participation in the appointment process that ha[d] been raised by the executive branch." H.R. Rep. No. 425, 96th Cong., 1st Sess. 14 (1979). The enacted legislation "preserve[d] the President's authority under the Appointments Clause," S. Rep. No. 570, 96th Cong., 2d Sess. 10 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 732, 741, by authorizing Congress only to recommend potential nominees for the President's consideration. General Accounting Office Act of 1980, Pub. L. No. 96-226, § 104(a), 94 Stat. 311, 314-15 (1980) (codified at 31 U.S.C. 703(a)(2)-(3)); J.A. 101.

B. The Comptroller General Performs His Duties Independently and Is Not Subservient to Congress

The district court disregarded the Comptroller General's status as an Officer of the United States and focused instead solely upon a never-used provision which subjects him potentially to removal for specified causes, after notice and hearing, by enactment of a joint resolution, which requires presentation to the President. The court concluded that the bare existence of this removal provision constitutionally disables the Comptroller General from performing the duties assigned to him under the Deficit Control Act because of "the Comptroller General's presumed desire to avoid removal by pleasing Congress." J.A. 57. The court's presumption that the Comptroller General is subservient to Congress is irreconcilable with both the statutory mandate of independence in the Comptroller General's chartering statute and the Comptroller's faithful adherence to that mandate.

1. Congress Provided the Comptroller General With a Statutory Mandate of Independence

The text and legislative history of the 1921 Act which established the General Accounting Office refute the district court's assumption that Congress intended to control the Comptroller General's performance of his administrative duties. That Act transferred to the Comptroller General all statutory duties of the Comptroller of the Treasury and directed that these functions were to be "exercised without direction from any other officer." Budget and Accounting Act, § 304; J.A. 94-95. Among the functions given to the Comptroller General were the duties of settling the government's financial accounts, adjusting claims by and against the government, and prescribing the government's accounting systems and procedures. *Id.*, §§ 305, 309; J.A. 96. Congress charged the General Accounting Office with the task of conducting "an independent audit" of the government's financial accounts, which

Congress viewed as "an essential part of any budget program." [20]

Because Congress believed that the vulnerability of the government's accounting officers to political forces debilitated the existing accounting system,[21] creation of an independent accounting office was a linchpin of the Act. One member of the House committee that initiated the proposal explained that the Comptroller General and his assistant "should be absolutely free and independent of official influences," because "they have very great and far-reaching responsibilities, and they must have a free hand to properly perform their very great duties."[22] Another member explained the committee's expectation "that the comptroller general might not only be brought into conflict with the executive department and with the executive branches of the Government, but sometimes with one side or the other of the aisle in Congress, and possibly both sides, in the impartial discharge of his duties." 58 Cong. Rec. 7282 (1919) (Rep. Bland). To achieve this goal of impartiality Congress made the Comptroller General "an independent officer of the United States who can render a decision according to the law and let the

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[20] S. Rep. No. 524, 66th Cong., 2d Sess. 6 (1920), *reprinted in* 59 Cong. Rec. 6351, 6352 (1920) (reporting predecessor bill).

[21] The chairman of the House committee explained that "one of the troubles with our present system is that the auditors dare not criticize. If they criticize, their political heads will come off." 58 Cong. Rec. 7282 (1919) (Rep. Good).

[22] *Id.*, 129 (Rep. Taylor). The central importance of obtaining an independent audit of government expenditures, free from political constraints and influences, was repeated throughout Congress' consideration of the Act. *See, e.g., id,* 7132 (Rep. Good) ("the comptroller general . . . will have under him a trained corps of auditors, who will owe their position to the fact that they are auditors rather than that they have performed political services"); *id.*, 7199 (Rep. Andrews) ("the accounting system of the Government will never reach its highest degree of efficiency and economy until the accounting offices become an independent organization with the comptroller at its head").

chips fall where they may."[23] The overriding message of the Budget and Accounting Act is Congress' determination that the Comptroller General "exercise the functions of that office independently" and, to ensure that he could do so, that "he should be free and untrammeled from any sort of interference from any source." 61 Cong. Rec. 986 (1921) (Rep. Bankhead).

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[23] 59 Cong. Rec. 8613 (1920) (Rep. Good). The intended independence of the Comptroller General was not undermined by occasional references to him in the debates as "an arm of the Congress. *See, e.g.*, 58 Cong. Rec. 7131 (1919) (Rep. Good). This phrase did not connote subservience to Congress but rather described the Comptroller's additional duties to "investigate . . . all matters relating to the receipt and disbursement of public funds, . . . [to] make such investigations and reports as shall be ordered by either House of Congress or by any committee . . . [and] to furnish [any] committee such aid and information as the committee may request. H.R. 9783, § 13, 66th Cong., 1st Sess. (1919). The Comptroller General was to be "an arm of the Congress" only in the limited sense that "Congress and its committees will at all times be able to consult with officials of this department regarding expenditures and from it will be able to obtain the most reliable information. . . ." 58 Cong. Rec. 7085 (1919) (Rep. Good); *see id.*, 7131 ("[T]here should be on the part of Congress an independent establishment, to whom Congress could go for its information"); *id.*, 7136 (Rep. Hawley) ("he is our officer, in a measure, getting information for us"); *id.*, 7278 (Rep. Byrns) ("He is subject to the will of Congress and every committee in furnishing it information."); 61 Cong. Rec. 982 (1921) (Rep. Good) ("the comptroller general sits there with the Committee on Appropriations as an arm of Congress and can supply the desired information").

The Court has recognized that, even when the GAO is performing these investigative duties, it functions as "an *independent agency* within the legislative branch that exists in large part to serve the needs of Congress." *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983) (emphasis added). In that case over GAO's right of access to contractors' records, the Court relied upon the Comptroller General's independence from Congress to conclude that "the fact that two Senators encouraged the GAO to use its lawful authority to the fullest extent possible is irrelevant. . . . [T]he fact that the Comptroller General's request had its origin in the requests of Congressmen or that the GAO reported the data to Congress does not vitiate its authority." *Id.*

2. The Bare Existence of the Never-Used Removal Provision Does Not Render the Comptroller General Subservient to Congress

The law employs a "presumption of regularity . . . that [public officers] have properly discharged their official duties." *United States v. Chemical Foundation, Inc.*, 272 U.S. 1, 14–15 (1926). "[I]n the absence of clear evidence to the contrary," *id.*, the Comptroller General is entitled to a presumption that since 1921 he has been faithfully performing his duties "without direction from any other officer," Budget and Accounting Act, § 304, J.A. 95.[24] The district court improperly reversed this presumption and, without adducing evidence of any kind beyond the existence since 1921 of that Act's removal provision, substituted its own assumption that the Comptroller General is subservient to Congress. J.A. 57.

The removal provision originated in the House version of the predecessor Budget and Accounting Act which President Wilson had vetoed in 1920. The House bill had provided for the Comptroller General to "hold office during good behavior," rather than for a fixed term of years, "so that these officers are entirely removed from any political influence or effect of changing administrations."[25] Members of the House repeatedly analogized the

[24] As Justice Frankfurter stated, "It is not to be presumed that for decades officials were either ignorant of the duties with which Congress charged them or derelict in their enforcement." *United States v. American Union Transport, Inc.*, 327 U.S. 437, 459 (1946) (dissenting).

[25] H.R. 9783, § 9, 66th Cong., 1st Sess. (1919); 58 Cong. Rec. 7142 (1919) (Rep. Linthicum). Although the Senate version had limited the Comptroller to a term of five years, *see* S. Rep. No. 524, *supra* note 20, at 13, the conference adopted the House's "good behavior" provision, *see* 59 Cong. Rec. 7944 (1920) (§ 303) (reprinting conference report). After President Wilson's veto of the bill was sustained, *id.*, 8613–14, the House passed the bill again without the removal provision, *id.*, 8657, but the Senate adjourned without acting on the bill.

The next year both Houses passed similar bills. The Senate bill provided the Comptroller General with a term of seven years, and stipulated that his for-cause removal could be undertaken only by joint, rather than concurrent, resolution. S. 1084, § 303, 67th Cong., 1st Sess.

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Comptroller General's office to the judiciary: "We thought that these men, having a judicial status, ought to have a judicial tenure of office." [26] In order to insulate the Comptroller General's "semijudicial" [27] position from becoming "a political football," [28] the House denied the President the power to remove the Comptroller General from office.[29]

As an alternative to presidential removal, the House bill provided for legislative action for removing a Comptroller General who had become "unfit to hold [his] place[ ]." 58 Cong. Rec. 7136 (1919) (Rep. Hawley). From the outset, the House made and adhered to the decision that the tenure of the Comptroller General would be protected by making him removable "only for cause." *Id.*, 7215 (1919) (Rep. Purnell). Critics of the proposal recognized that the removal provision would not permit the Congress to remove the Comptroller General because it disagreed with his policies.[30] Overriding that objection,

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(1921). The House substitute retained the appointment for good behavior and provided for removal by concurrent resolution. H.R. 30, § 303, 67th Cong., 1st Sess. (1921). The conference agreement, which President Harding signed into law, provided the Comptroller General with a term of fifteen years and adopted the Senate's provision on removal by joint resolution. H.R. Conf. Rep. No. 96, 67th Cong., 1st Sess. 5 (1921), *reprinted in* 61 Cong. Rec. 1783, 1784-85 (1921).

[26] 58 Cong. Rec. 7136 (1919) (Rep. Hawley); *accord id.*, 7276 (Rep. Good) ("I feel that this office is to be akin to that of a Federal judge"); 59 Cong. Rec. 8610 (1920) (Rep. Good) ("the committee was guided by a single thought, and that was that these two officers [the Comptroller General and his assistant] should be placed upon a plane somewhat comparable to the position occupied by Federal judges").

[27] H.R. Rep. No. 362, *supra* note 17, at 9.

[28] 58 Cong. Rec. 7277 (1919) (Rep. Madden).

[29] The House defeated an amendment to permit the President to discharge the Comptroller General at will. *Id.*, 7281. Subsequently, the House defeated an amendment to empower the President to remove the Comptroller for specified causes only. 61 Cong. Rec. 1083-84 (1921).

[30] 58 Cong. Rec. 7205-06 (1919) (Rep. Steagall) ("in no event would the [removal] question hinge upon whether or not [the Comptroller General] was cautious or liberal regarding expenditure of money for the public welfare. . . . [W]e see there is nothing in these [for-cause

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the suggestion that Congress should "have the power to remove the official without alleging any cause," *id.*, 7279 (Rep. Black), was turned back, because "it was the idea of the committee in making this recommendation to remove this official as far as we could from politics." [31] Instead the House bill limited removal to specified causes.[32] The ranking member of the House committee emphasized that the House intended the for-cause limitation to be "controlling" because "it can not be changed by future Congresses except by a bill or joint resolution, which would require the approval of the President."[33]

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removal] provisions of the act that would enable the Congress to get rid of a Comptroller General . . . because of a failure to economize."); *accord id.*, 7279.

[31] *Id.* (Rep. Byrns). One member remarked that the removal provision "practically gives the comptroller general the same independence and immunity from partisan political control as is now enjoyed by the employees of the Government in civil service." *Id.*, 7283 (Rep. Briggs). A witness before the House committee testified, "I think the chairman of this committee, by the provision in his bill, that he should hold office unless removed by a vote of the Congress for cause, has in mind practically a tenure during good behavior. *National Budget System Hearings, supra* note 16, at 396 (former House Appropriations Committee Chairman Sherley).

[32] The initial grounds for removal were "inefficiency," "neglect of duty," and "malfeasance in office." Two additional causes, "crime or conduct involving moral turpitude" and "permanent incapacitation," were subsequently added. *Id.*, 7282; 61 Cong. Rec. 1083 (1921). The removal provision as now codified states: "[The Comptroller General] may be removed at any time by— (A) impeachment; or (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for— (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." J.A. 102. Initially, the bill did not contain an explicit impeachment alternative. H.R. 9783, § 9, 66th Cong., 1st Sess. (1919). The impeachment provision was added to establish explicitly that, as an Officer of the United States, the Comptroller General was understood to be impeachable. 58 Cong. Rec. 7281 (1919).

[33] 58 Cong. Rec. 7279 (Rep. Byrns). The House recognized that it would be "intricate and difficult to remove this officer by the joint action of the two Houses of Congress." *Id.*, 7280 (Rep. Candler). Some members thought that this would be more difficult than the alternative of impeachment. *See, e.g., id.; id.*, 7279 (Rep. Steagall) ("he

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This Court has since established that a for-cause removal provision is consistent with the status of an independent officer, "[f]or it is . . . one who holds his office at the *pleasure* of another, [who] cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935) (emphasis added). The existence of the for-cause removal provision in the Budget and Accounting Act makes the Comptroller General no more subservient to the Congress than a member of the Federal Reserve Board, who is removable by the President only for cause under 12 U.S.C. 242, is subservient to the President. Indeed, given the statutory requirements for notice and hearing, and the constraints that bicameralism and presentment impose on the enactment of a joint resolution,[34] the independence of the Comptroller General is far more secure than that of Federal Trade commissioners or Federal Reserve Board members.[35] The mere existence of the

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would have a right to be heard, and it would involve a regular trial before both Houses of Congress, and the Lord only knows how long it would take"). Others thought that it would be "a readier and quicker way [than impeachment] of getting rid of an incompetent and inefficient official." *Id.*, 7278 (Rep. Byrns).

[34] Bicameralism and presentment assure that removal "legislation should not be enacted unless it has been carefully and fully considered by the Nation's elected officials." *INS v. Chadha*, 462 U.S. 919, 949 (1983).

[35] Comptrollers General have shared the Congress' understanding that "[t]he legislative history of the 1921 Act consistently stressed that the Comptroller General should exercise objective and independent judgment, unfettered by political influence from congressional as well as executive branch sources." Comptroller General of the United States, *Annual Report* 1 (1976). Furthermore, they have not viewed the removal provision as inconsistent with, or a threat to, their mandated independence, but to the contrary have stated, "Present requirements for notice and hearings, and removal only by impeachment or for statutorily specified grounds by joint resolution . . . provide the independence vital to achievement of the Comptroller General's statutory mission." *GAO Legislation: Hearing Before the Subcomm. on Reports, Accounting, and Management of the Senate Comm. on Government Operations*, 94th Cong., 1st Sess. 20 (1975) (Comptroller General Staats).

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for-cause removal provision provides no support for the district court's presumption that the Comptroller General is subservient to Congress.

C. Prudential Concerns Preclude the Current Adjudication of the Potential Exercise of the Removal Provision

The restraint with which the Court approaches separation of powers controversies and the respect that the Court shows coordinate branches counsel against adjudicating the potential exercise of the removal provision in these appeals.

1. This Court Has Never Decided Disputes Over the Separation of Legislative and Executive Powers Until the Challenged Power Has Been Exercised

This Court should not resolve in these cases the effect of the removal provision in the Budget and Accounting Act in adherence to its historical "refusal[] to undertake the most important and the most delicate of the Court's functions . . . until necessity compels it. . . ." *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 569 (1947). The Court has resolved challenges to Congress' exercise of authority to appoint an officer only after "Congress had exercised the claimed power to appoint." *Clark* v. *Valeo*, 559 F.2d 642, 658 (D.C. Cir.) (en banc) (per curiam), *aff'd mem. sub nom. Clark* v. *Kimmitt*, 431 U.S. 950 (1977). *See, e.g., Buckley* v. *Valeo*. The Court has never resolved Congress' authority to limit the President's ability to remove an of-

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Because the Comptroller General has "never accepted the dependent status thrust at [him]," *Glidden Co. v. Zdanok*, 370 U.S. 530, 584 (1962) (plurality opinion), by the district court's presumption that he is subservient to Congress, this Court need do "no more than confer legal recognition upon an independence long exercised in fact," *id.*

Plaintiffs have not disputed that the Comptroller General has performed his reporting duty under the Deficit Control Act entirely independently from Congress. Indeed, the manner in which the Comptroller has performed his reporting duty for this fiscal year has not possibly affected plaintiffs adversely, because Congress' stipulation of the excess deficit amount and sequestration ceiling for this year ensured that "[n]o alternative assumptions which [the Comptroller General] might [have] adopt[ed] would" have changed the amount of the sequester. 51 Fed. Reg. 2814.

ficer before the President had removed an officer and his authority was challenged. *Myers* v. *United States*, 272 U.S. 52 (1926); *Humphrey's Executor* v. *United States*; *Wiener* v. *United States*, 357 U.S. 349 (1958). Similarly, in adjudicating Congress' authority to countermand decisions of executive officers without enacting a law, the Court has waited until one House of Congress had passed a legislative veto and its authority was challenged. *INS* v. *Chadha*, 462 U.S. 919 (1983). In short, in every case in which this Court has adjudicated the separation of executive and legislative powers, the challenged action—whether it be an appointment, a removal, or a legislative veto—had occurred.

Contrasting sharply with this Court's jurisprudence, the district court invalidated the Deficit Control Act, even though in the sixty-five years since the establishment of the GAO, Congress has never attempted to remove the Comptroller General. The court decided to examine the removal provision because it believed that "the Comptroller General's presumed desire to avoid removal by pleasing Congress . . . creates the here-and-now subservience to another branch that raises separation-of-powers problems." J.A. 57. In deciding to examine the unused removal provision to determine the constitutionality of the Deficit Control Act, the district court relied principally on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (plurality opinion). In that case the Court adjudicated a constitutional challenge to the Bankruptcy Act of 1978, which had assigned Article III functions to bankruptcy judges who were appointed to fourteen-year terms, were subject to removal for cause by judicial councils, and whose salaries were subject to diminution. The district court likened "the Comptroller General's presumed desire to avoid removal by pleasing Congress" to "the bankruptcy judge's awareness of the possibility of non-reappointment." J.A. 57.[36]

[36] The district court countered the view that the unused removal provision does not require adjudication by analogizing it to a claim

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The Court's resolution of *Marathon* does not support adjudication of the removal provision in this case. The issue in *Marathon* was whether officers who had been appointed to unquestionably Article I judgeships could perform their assigned duties. The judges' susceptibility to removal was not itself an issue in the case, but was, along with the judges fourteen-year terms and lack of salary protection, among the manifestations of Congress' intent that they be Article I, not Article III, judges. Because the Article I status of the offices was manifest regardless of the removal provision, the Court's decision to resolve the question over the constitutionality of the offices was not grounded in the existence of the removal provision. Therefore, the lack of use of the removal provision was not an issue in the Court's resolving the compatibility between the judges' Article I status and their duties. In con-

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"that a tenure statute providing for removal of a judge exercising Article III powers by joint resolution could similarly not be challenged, a prospect we are not prepared to entertain." J.A. 59. In fact, one appellate court has refused to adjudicate the claim that a statute facially interferes with the independence constitutionally guaranteed Article III judges, even when the claim was made by a judge himself. *See Hastings v. Judicial Conference of the United States,* 770 F.2d 1093, 1100–1103 (D.C. Cir. 1985), *petition for cert. filed,* No. 85–1301 (Jan. 30, 1986) (dismissing as premature challenge to Judicial Councils Reform and Judicial Conduct and Discipline Act of 1980). In a related controversy, another court sustained the constitutionality of several facially valid sanctions provided by the Act, but declined to adjudicate, in advance of their use, whether other potential sanctions unconstitutionally infringe on judicial independence. *In the Matter of Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,* Nos. 85–2054 & 85–5420, slip. op. at 35–56 (11th Cir. Feb. 20, 1986).

If the district court correctly interpreted *Marathon* as permitting adjudication of the unused removal provision in the Budget and Accounting Act, then every litigant before an Article III judge is equally entitled to an adjudication of the constitutionality of the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980, because, in the court's logic, "it is [the judge's] presumed desire to avoid [discipline] by pleasing [the judicial council] which creates the here-and-now subservience . . . that raises separation-of-powers problems." J.A. 57.

trast here, the district court's challenge to the Comptroller's ability to perform his assigned duties rested solely upon the existence by itself of the unused removal provision. Thus, unlike *Marathon* the constitutional question presented here is based solely on the existence of a power that has never been exercised. *Marathon* provides no basis for abandoning the Court's consistent practice of deciding questions over the removal power only after an officer has been removed.[37]

Based on its misunderstanding of *Marathon* the district court established an unprecedented right for individuals to challenge under the Appointments Clause potential infringements between the branches that have not occurred and may never occur.[38] The court's premature adjudica-

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[37] Another reason why *Marathon* does not support the adjudication of the removal provision here is that the cases derive from different constitutional provisions, which provide different guarantees. In *Marathon* the Court tested the bankruptcy judges' authority against the "good Behavior" Clause, art. III, § 1, which guarantees that officers who exercise a particular type of authority—Article III power—will not be subject to "[p]eriodical appointments, however regulated, or by whomsoever made." A. Hamilton, *The Federalist Papers No. 78*, at 495 (B. Wright ed. 1961). Unlike the Appointments Clause, the "good Behavior" Clause was designed not only "to maintain the checks and balances of the constitutional structure, [but] also to guarantee that the process of adjudication itself remained impartial." *Marathon*, 458 U.S. at 58. To fulfill that guarantee the Court permits litigants to challenge exercises of judicial authority under the "good Behavior" Clause. *See, e.g., Thomas v. Union Carbide Agricultural Products Co.*, 105 S.Ct. 3325, 3332 (1985); *Palmore v. United States*, 411 U.S. 389 (1973); *Glidden Co. v. Zdanok*.

[38] Both opponents and supporters of the removal provision have long recognized that "the only manner in which this question could be presented for judicial examination would be by removal of the Comptroller General. This has never been done and therefore no opportunity has ever been offered to test the validity of the removal provision." *Constitutionality of the General Accounting Office: A Monograph Submitted to the House Select Comm. on Government Organization*, 75th Cong., 3d Sess. 2 (Comm. Print 1938); *accord* 59 Cong. Rec. 8611 (1920) (Rep. Good and Rep. Bland); H. Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration* 75 (1939) ("to secure a judicial settlement of the removal power there must be a removal").

tion of the dormant removal provision violates the policy of restraint through which this Court has "astutely avoided adjudication of the power of control as between Congress and the Executive of those serving in the Executive branch of the Government 'until it should be inevitably presented.'" *United States v. Lovett*, 328 U.S. 303, 328 (1946) (Frankfurter, J., concurring) (quoting *Myers*, 272 U.S. at 173).[39]

2. The Court Should Not Anticipate Congress' Use of the Removal Provision

The challenged statutory provision creates procedures to guide the consideration by future Congresses of a joint resolution to remove the Comptroller General. Only the actual enactment of such a future joint resolution, which would itself be a statute, and not the present procedures, could cause the Comptroller General's removal and constitute an exercise of Congress' authority. Because the district court incorrectly assumed that the Comptroller General is subservient to Congress, it unnecessarily anticipated how the Congress, which as a coordinate branch of government shares responsibility for assessing the constitutionality of its actions, would consider any future

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[39] The Court's adjudication of *Lovett* demonstrates the soundness of this principle of restraint. *Lovett* presented the question of Congress' power, under the bill of attainder clause, to enact an appropriations statute forbidding the disbursement of funds to pay salaries of specified government employees. The Court based its invalidation of the statute upon its "interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to its passage." 328 U.S. at 307. The Court's reliance upon Congress' purpose in removing the employees in *Lovett* demonstrates the current prematurity of an adjudication of this removal provision, whose lack of use would require a resolution "on the basis of imaginary and non-existent facts." *Id.* at 329 (Frankfurter, J., concurring). By deciding the case on bill of attainder grounds, the Court avoided adjudication of the Executive branch's broader claim that the statute infringed on the Executive's removal power. *See* Ely, United States v. Lovett: *Litigating the Separation of Powers*, 10 Harv. C.R.-C.L. L. Rev. 1, 30 (1975).

proposal to use the dormant, sixty-five-year-old removal provision.[40]

Congress enacted the removal provision in the 1921 Budget and Accounting Act only after careful deliberation to determine that such a provision was consistent with the constitutional status of an independent office.[41] Since then, this Court's subsequent decisions in *Myers v. United States* and *Humphrey's Executor v. United States* have shed additional light on the constitutional issues, which could affect judgments concerning the correctness of the Congress' determination.[42] The Congress merits

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[40] The district court analogized Congress' "formal assertion (by legislation) of the power" to remove the Comptroller General to an administrative agency's "formal assertion (by rule) of the power to [punish conduct]. *Cf. Abbott Laboratories v. Gardner,* 387 U.S. 136 (1967)." J.A. 58. The court's reliance upon *Abbott Laboratories,* in which the Court permitted pre-enforcement review of agency regulations, slights the gravity of the judicial function of declaring an Act of Congress unconstitutional and the deference owed a coordinate branch. *Abbott Laboratories* presented an Administrative Procedure Act claim that regulations violated the agency's statutory authority. There was no constitutional claim, let alone an attempt to declare a statute unconstitutional. The Court's balancing between the fitness of issues for review and the hardship of withholding adjudication in such a context, 387 U.S. at 149, offers little guidance for adjudicating the constitutional status of the Comptroller General.

Moreover, the challenge in *Abbott Laboratories* was to freshly adopted regulations whose impact upon the litigants was "direct and immediate." *Id.* at 152. The analogy between new regulations that pose a dilemma between complying at great cost or facing potential criminal penalties, *id.*, and this sixty-five-year-old provision, which has never been used, is far-fetched. A closer source of learning is this Court's refusal to adjudicate constitutional challenges to criminal "provisions that have during so many years gone uniformly and without exception unenforced." *Poe v. Ullman,* 367 U.S. 497, 508 (1961) (plurality opinion).

[41] *See, e.g.,* 59 Cong. Rec. 8610–13 (1920); 60 Cong. Rec. 339–41 (1920); 61 Cong. Rec. 982–84, 989–92 (1921).

[42] Additionally, this Court's decision in *United States v. Lovett* would be relevant to the Congress' consideration of any proposal to remove a Comptroller General, because the statute invalidated in that case was "designed to force the employing agencies to discharge respondents. . . ." 328 U.S. at 314.

the presumption that if it ever were to consider using the removal provision, it would, in execution of its Members' oaths to uphold the Constitution,[43] conscientiously examine the constitutionality of the proposed action in light of the Court's decisions subsequent to the 1921 Act.[44]

The district court's adjudication of the removal provision, anticipating the outcome of debates that will never occur unless a proposal is made that the Congress employ the provision, cannot be reconciled with the Court's obligation to avoid resolving "a question of constitutional law in advance of the necessity of deciding it." *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346 (1936) (Brandeis, J., concurring).

D. The Removal Provision Should Be Severed If It Is Inconsistent With the Comptroller General's Duties Under the Deficit Control Act

If the existence of the removal provision in the 1921 Act is incompatible with the Comptroller General's functions under the 1985 Act, then either the removal provision or the functions must be invalidated. This determi-

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[43] "The Congress is a coequal branch of government whose Members take the same oath we do to uphold the Constitution of the United States." *Rostker v. Goldberg,* 453 U.S. 57, 64 (1981).

[44] This Court has previously relied upon Congress' "great debate" in 1789 on the constitutional removal question. *Myers,* 272 U.S. at 121, 111-36. At other critical junctures of American political history, the Congress has conducted similarly sustained and scholarly debate on the constitutional question. *See, e.g.,* 10 Cong. Deb. 834-36, 1318-39, 1498-1519, 1573-78, 1628-30, 1679-89 (1834) (debate led by Senators Webster and Clay over President Jackson's removal of Treasury Secretary Duane for refusal to withdraw government deposits from United States Bank); Supp. to Cong. Globe, 40th Cong., 2d Sess. 32-34, 125-30, 255-64, 273-76, 315-16, 327-31, 353-56 (1868) (impeachment trial of President Andrew Johnson for removal of War Secretary Stanton).

The court's analogy to the justiciability of a hypothetical "statute providing for removal of a judge exercising Article III powers by joint resolution," J.A. 59, impugns the Congress' performance of its constitutional responsibility. The removal provision in the Budget and Accounting Act was not a gauntlet thrown down by Congress to challenge the decisions of this Court or the independence of coordinate branches. It was the product of Congress' conscientious deliberations regarding the requirements of the Appointments Clause as informed by this Court's decisions at the time.

nation is a severability question, which is "largely a question of legislative intent." *Regan v. Time, Inc.*, 104 S.Ct. 3262, 3269 (1984) (plurality opinion). Congress' intent from the establishment of the GAO in 1921 through the enactment of the Deficit Control Act favors the preservation of the Comptroller's functions.

1. The Severance Choice Between the Removal Provision and the Deficit Control Act Is Governed by Legislative Intent

Plaintiffs allege that they have been injured by the delegation of particular duties to "an official[ ] of the legislative branch." J.A. 10, 14. Regardless of which were severed—the removal provision, which the district court presumed renders the Comptroller General subservient to Congress, or the Deficit Control Act, which assigns duties to him—the alleged wrong would be cured: no impermissible functions would be performed by an official under legislative control.

A similar choice between constitutionally incompatible provisions is posed in equal protection challenges to benefit programs. When a statute is constitutionally underinclusive, "there exist two remedial alternatives: a court may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by exclusion." *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J. concurring). The Court sees this as a severability question in which it "should not . . . 'use its remedial powers to circumvent the intent of the legislature.'" *Heckler v. Mathews*, 104 S.Ct. 1387, 1394 n.5 (1984) (quoting *Califano v. Westcott*, 443 U.S. 76, 94 (1979) (Powell, J., concurring and dissenting)). Similarly, the Court's determination whether the removal provision or the Comptroller General's functions under the Deficit Control Act should be severed to remedy a constitutional conflict must be governed by congressional intent.

The district court eschewed reliance upon legislative intent to choose between the two statutes because it viewed the Deficit Control Act as the statute that caused the injury which conferred standing upon the plaintiffs.[45] However, the plaintiffs are not entitled to nullify the sequestration that reduced their funds any more than the victim of a constitutionally underinclusive statute is entitled to receive "any particular amount of benefits." *Heckler v. Mathews,* 104 S.Ct. at 1394. Neither litigant's "standing . . . depend[s] on his ability to obtain increased . . . payments," *id.,* because "when the 'right invoked is that of equal treatment,' the appropriate remedy is a mandate of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class," *id.* at 1395 (quoting *Iowa-Des Moines National Bank v. Bennett,* 284 U.S. 239, 247 (1931)) (emphasis omitted). Similarly, the plaintiffs have no legally cognizable interest in which of the two provisions in these appeals is invalidated, the removal provision or the delegation of administrative responsibilities under the Deficit Control Act. Their standing under the separation of powers exists only to redress the injury resulting from the allegation that the two provisions are "constitutionally imcompatible." J.A. 61. As long as any incompatibility that ag-

[45] J.A. 59. The cases cited by the district court, J.A. 59-60, did not present a severability issue. In *Marathon, Buckley v. Valeo,* and *Springer v. Government of the Philippine Islands,* 277 U.S. 189 (1928), litigants challenged officers' exercise of authority by alleging that their appointments did not conform to constitutional requirements. Invalidating the officers' authority was necessary to provide each challenger with relief, because no severance of the offending conditions of the officers' appointments could have remedied the constitutional defect. Because courts are not permitted to rewrite statutes, *United States v. Reese,* 92 U.S. 214, 221 (1875); *Marchetti v. United States,* 390 U.S. 39, 60 n.18 (1968), the Court was not free to alter the constitutional status of the offices by, for example, transferring the appointment authority of the Federal Election commissioners to the President in *Buckley,* or converting the bankruptcy judges to Article III judges with lifetime tenure in *Marathon.*

grieves plaintiffs is remedied, they will have obtained all of the relief to which they are entitled.[46]

This Court's decisions refute any contention that it is significant that the removal provision and the authority challenged by the plaintiffs are in separate statutes. When the Court resolves challenges to an officer's authority, it necessarily reviews the organic statute that chartered the office as well as the statute that conferred the challenged authority. In *Glidden Co. v. Zdanok,* 370 U.S. 530 (1962) (plurality opinion), the Court sustained statutes assigning to the judges of the Court of Claims and the Court of Customs Appeals the additional duty of serving on other Article III courts. The challengers had argued that the two courts were not Article III courts and that their judges could not constitutionally be assigned the additional duty to sit on Article III courts. They had based their challenge on the existence of other statutes conferring upon the two courts jurisdiction allegedly incompatible with the exercise of judicial power. 370 U.S. at 579–82. The parallel to the present appeals is that the plaintiffs are similarly challenging the assignment of new duties to

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[46] Permitting a litigant to select which provision to invalidate would lead to the arbitrary result that whichever of two incompatible provisions is first challenged is invalidated while the other provision remains on the books. The district court's approach suggests, for example, that any individual aggrieved by an action of the Tennessee Valley Authority could obtain an invalidation of TVA's plainly executive power-generating and development authority, because an unused but extant statute purports to authorize removal of TVA board members by *concurrent* resolution of the Congress, 16 U.S.C. 831c, which would arguably render them more responsive to Congress than the joint resolution which covers the Comptroller General. There is no support in the law for this arbitrary outcome.

It is irrelevant that plaintiffs' complaints prayed for invalidation of the Deficit Control Act, not the removal provision in the Budget and Accounting Act. In declaratory judgment actions as in others, it is "the court's duty to grant the relief to which the prevailing party is entitled, whether it has been demanded or not. . . . The question is not whether plaintiff has asked for the proper remedy but whether he is entitled to any remedy." 10 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure: Civil 2d,* § 2664, at 146, 153–54 (1983).

an office, and are basing their challenge on an alleged defect in the original structure of the office. However, this Court in *Glidden* rejected the attempt to invalidate the subsequent assignment statutes on the basis of potential defects in early jurisdictional statutes. The Court dismissed the contention that the "independence of either [court] has been so compromised by its investiture with [this questionable] jurisdiction . . . as to destroy its eligibility for recognition as an Article III court." *Id.* at 582. Assuming "that [the jurisdiction] cannot be entertained by an Article III court," the Court held, "[i]t does not follow . . . that . . . the [courts] must relinquish entitlement to recognition as an Article III court." *Id.* Instead, the Court preserved the courts' Article III status and their new statutory duties, and held that "if necessary, the particular offensive jurisdiction . . . would fall." *Id.* at 583.[47] Analogously, any constitutional incompatibility between the Comptroller General's removal provision and his authority under the Deficit Control Act does not necessarily render his functions under the Deficit Control Act invalid. Instead, as in *Glidden,* the Court must examine Congress' intent to determine which provision to sever.

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[47] Similarly, in *Ex Parte Bakelite Corporation,* 279 U.S. 438 (1929), the Court resolved a challenge to the constitutionality of a statute that permitted the Court of Customs Appeals to hear appeals from decisions of the Tariff Commission that were reviewable by the President. The challenger's argument was the mirror image of *Glidden*: it maintained that the court was an Article III court that could not exercise the non-Article III jurisdiction conferred upon it by statute. The challenger argued that a statute authorizing other Article III judges to sit upon the court demonstrated that the court was an Article III court, because otherwise Article III judges could not constitutionally sit on it. As in *Glidden* the Court rejected the contention that the constitutional incompatibility between the two statutes required invalidation of the court's exercise of non-Article III functions, because "if there be constitutional obstacles to assigning judges of constitutional courts to legislative courts, the provision cited is for that reason invalid. . . . " 279 U.S. at 460.

2. Preserving the Comptroller General's Duties Under the Deficit Control Act and Severing the Removal Provision in the Budget and Accounting Act Conforms Most Closely to the Intent of Congress

The severability question is whether " 'the Legislature would . . . have enacted those provisions which are within its power, independently of that which is not. . . .' " *Buckley*, 424 U.S. at 108 (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)). Two questions must be asked: (1) whether Congress would have assigned administrative duties to the Comptroller in 1921, independently of the removal provision, and (2) whether Congress would have assigned additional functions to the Comptroller under the Deficit Control Act in 1985, independently of the removal provision. To answer these questions, it is necessary to examine Congress' intent in enacting each law.

a. Congress' creation of the General Accounting Office did not depend upon the removal provision

Congress' primary purpose in establishing the General Accounting Office was to enhance the accountability of the government's financial systems by placing auditing and accounting functions under the control of an independent officer. H.R. Rep. No. 14, 67th Cong., 1st Sess. 7, 8 (1921). Congress transferred to the Comptroller General functions that had previously been the responsibility of Executive officials, because, "inasmuch as [these executive officials] owe their appointment to the President, they could not hope to hold their positions if they criticized wastefulness or extravagance or inefficiency in any of the departments." *Id.* at 7. Congress specifically assigned the Comptroller General the duty to settle claims by or against the United States, to adjust government accounts, and to prescribe accounting systems for the government. Budget and Accounting Act, §§ 304–305, 309; J.A. 94–96. The Act transferred to the Comptroller the authority to disallow payments and finally settle ac-

counts so that he "could exercise it independently of either the executive or legislative branches." F. Mosher, *supra* page 13, at 50.

The importance of the mechanism for the Comptroller General's removal was secondary to the need for an independent auditing and accounting process outside of the control of the Executive.[48] Although the legislative history expresses Congress' preference for a legislative removal provision, it also demonstrates that Congress was willing to forgo it if necessary to obtain the transfer of the auditing and account settlement functions from the Treasury Department to an officer independent of the Executive. After President Wilson's veto of the predecessor bill to the Budget and Accounting Act, the severability question was raised explicitly in the House. Representative Pell inquired, "If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue." 59 Cong. Rec. 8611 (1920). The response was, "Certainly." *Id.* (Rep. Blanton).[49] Furthermore, both Houses of Congress passed bills containing no provision for legislative removal at all at different times

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[48] To enable the Comptroller General to perform these functions independently, Congress established the General Accounting Office "independent of the executive departments," *id.*, § 301; J.A. 93, and directed the Comptroller to exercise his functions "without direction from any other officer," *id.*, § 304; J.A. 95. To enhance the Comptroller's independence, the Act prohibited the President from removing him. *Id.*, § 303; J.A. 94. *See* pages 21–22 *supra*.

[49] Representative Good had not considered the question, which he thought was "very remote" and could be raised only after a Comptroller General had been removed. *Id.* President Wilson's veto message reveals that the Executive shared Congress' understanding that the elimination of the removal provision would be preferable to the evisceration of the Comptroller General's duties. President Wilson vetoed the bill because he believed "that the vesting of this power of removal in the Congress is unconstitutional. . . ." H.R. Doc. No. 805, 66th Cong., 2d Sess. 2 (1920). Wilson did not maintain that the Comptroller General's administrative functions were unconstitutional because of the removal provision, but that the removal provision was unconstitutional.

during the consideration of the Act.[50] Had Congress been forced to choose, the evidence demonstrates that it would have created the General Accounting Office to perform accounting functions independently of the Executive, with no legislative means of removal.

In *INS v. Chadha* the Court severed the means by which Congress had retained control of the Attorney General's exercise of authority to suspend deportations of aliens from the grant of the authority, notwithstanding Congress' demonstrated "reluctan[ce] to delegate final authority over cancellation of deportations." 462 U.S. at 932. Although the Congress which enacted the Budget and Accounting Act preferred to provide for the removal of the Comptroller General by joint resolution, its establishment of the GAO and transfer of duties to the Comptroller General was in no way dependent upon the removal provision. If necessary, the removal provision should be severed because "the policies Congress sought to advance by enacting [the 1921 Act] can be effectuated even though [the removal provision] is unenforceable." *Regan v. Time, Inc.*, 104 S.Ct. at 3269.

The district court's assumption that Congress would have stripped the Comptroller General of his administra-

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[50] Initially, the removal provision was adopted at the instance of the House, which included it in its 1919 bill. H.R. 9783, § 9, 66th Cong., 1st Sess. (1919). The Senate struck the provision and reported an amendment with no mechanism for removal by resolution, but permitting the President to remove the Comptroller General for cause only. *Id.*, § 21. President Wilson's veto followed the conference's adoption of the House version. After the veto was sustained, the House passed the Act again, without any removal provision. 59 Cong. Rec. 8657 (1920). The Senate adjourned without acting on the bill.

The conclusion that Congress did not view removal authority as essential to the Act is also demonstrated by Representative Good's reliance on a Library of Congress memorandum analyzing the constitutional issues raised by President Wilson's veto. The memorandum maintained that the removal provision was constitutional, but concluded that if Congress were to choose between permitting the Comptroller General to be removed by the President or sacrificing the power of removal, "on the whole . . . this officer would be more effective if he could be removed only by impeachment. . . ." 60 Cong. Rec. 341 (1920).

tive functions rather than sacrifice the removal power is inconsistent with "[t]he cardinal principle of statutory construction[, which] is to save and not to destroy." *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Severing the Comptroller General's administrative functions would defeat Congress' basic intention in the Budget and Accounting Act to obtain independent governmental audits and accounting. It would imply that Congress would have preferred that there be no independent auditing and accounting capability at all unless it could retain the right to remove the officer charged with these tasks. There is no support in the legislative history for the anomalous suggestion that Congress would have risked entirely destroying the government's accounting procedures in enacting legislation intended to strengthen the accounting system by placing it under the control of an independent officer.[51] The Court should adhere to Congress' dominant purpose in creating the General Accounting Office.[52]

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[51] This Court's decision in *Glidden* demonstrates that examination of the balance of functions conferred upon an officer is essential to determine whether the officer's functions should be invalidated to remedy a constitutional problem in the office. 370 U.S. at 583 (rejecting attempt "to make the status of these courts turn upon so minuscule a portion of their purported functions").

[52] The conclusion that Congress viewed the establishment of an independent officer to perform auditing and accounting as more important than reserving the power to remove that officer is reflected in Congress' subsequent consideration of proposals to alter the GAO. Since 1921 Congress has rejected proposed legislation to divide the administrative functions of the Comptroller General from the investigative functions. These bills, initiated by the Executive, would have returned the Comptroller General's accounting functions to the full control of the Executive branch while retaining an officer, removable by the Congress, to perform solely investigative tasks for Congress. *See, e.g.*, S. Rep. No. 1236, Pt. 2, 75th Cong., 3d Sess. 28, 37-40 (1938) (reprinting bill drafted by President's Committee on Administrative Management); S. 2970, §§ 301-306, 75th Cong., 1st Sess. (1937); S. 3331, §§ 301-306, 75th Cong., 3d Sess. (1938). In lieu of these proposals, which would have effectively severed the Budget and Accounting Act along the lines of the district court's decision, the Congress enacted

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b. Congress' selection of the Comptroller General to report excess deficits did not depend upon the removal provision and should be preserved

Congress' assignment of reporting duties to the Comptroller General in the Deficit Control Act was not dependent upon the viability of the legislative removal provision in the Budget and Accounting Act. To the contrary, the reason that Congress ultimately conferred the duty to report excess deficits upon the Comptroller General was precisely because Congress knew that he was politically independent of both the President and the Congress. The initial version of the Deficit Control Act had given the Directors of the OMB and CBO the shared duty of reporting excess deficits to the President. *See* pages 12–13 *supra*. After concerns were raised about the constitutionality of the role given CBO, the Congress determined to limit both it and OMB to an advisory role. The final duty to report excess deficits was given instead to the Comptroller General because he is a trusted, neutral official who has expertise in the government's financial accounts as well as political independence from both Congress and the Executive.

The decision to assign this reporting duty to the Comptroller General answered the need of congressional critics of the Act for "a wall to be created that takes these [administrative] decisions out of the hands of the President *and the Congress*, . . ." 131 Cong. Rec. H9846 (Nov. 6, 1985) (Rep. Gephardt) (emphasis added). There is no evidence anywhere in the legislative history of the Deficit Control Act suggesting that Congress viewed the removal provision as relevant, let alone instrumental, to its decision to vest the reporting authority in the Comptroller

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the Reorganization Act of 1939, which preserved the Comptroller General's dual mission and prohibited the President from transferring or abolishing any of his functions. Pub. L. No. 19, § 3(b), ch. 36, 53 Stat. 561 (1939). Congress' action militates strongly against severing the 1921 Act by divesting the Comptroller General of his administrative duties.

General.[53] There is no reason to doubt that Congress would have given the Comptroller General the duty to report excess deficits regardless of the removal provision.

The conclusion that the removal provision should be severed if necessary to preserve the Comptroller General's functions under the Deficit Control Act is not altered by Congress' enactment of an alternative "fallback" procedure "[i]n the event that any of the reporting procedures [in the trigger mechanism] are invalidated." Act, § 274(f); J.A. 165. Under the fallback procedure a special joint congressional committee forms to receive the deficit estimates of OMB and CBO. Then, in place of the administrative mechanism, the fallback provides for the committee to report to the Congress a joint resolution whose enactment would require the President to sequester the funds necessary to eliminate the excess deficit.

The district court relied upon the fallback provision to sever the reporting mechanism because "setting aside the grant of powers to the Comptroller General would result in a state of affairs that Congress unquestionably was willing to accept." J.A. 61.[54] The court's presumption

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[53] The district court "doubt[ed] that the automatic deficit reduction process would have passed without . . . protection [against what the House conceived to be the pro-executive bias of the OMB], and doubt[ed] that the protection would have been considered present if the Comptroller General were not removable by Congress itself." J.A. 60. Although it is indisputable that Congress demanded that the reporting function be performed by an official independent of the Executive's budget policy apparatus, which OMB is not, there is no support in the legislative history for the district court's assumption that Congress intended also to retain control over the official performing the estimating duty.

[54] Strictly, the existence of the fallback procedure is not relevant to the Court's severability determination, because Congress provided for the fallback to take effect only after an invalidation of the reporting mechanism. Determining whether to invalidate the mechanism requires a prior decision whether the reporting duties or the removal provision should be severed. Congress' stipulation that the fallback should be used once the reporting mechanism is severed is not probative of whether Congress would have enacted the reporting mechanism without the removal provision. The attempt to extract Congress'

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that the Congress was "willing to accept" the fallback mechanism is overwhelmingly rebutted by the legislative history of the Deficit Control Act. From the day that the Deficit Control Act was first introduced, Congress universally understood that "[t]he most important feature of our proposal . . . is its creation of a mechanism which will automatically institute the budget cuts necessary to achieve the prescribed deficit targets." 131 Cong. Rec. S12084 (Sept. 25, 1985) (Sen. Rudman).[55]

Throughout its deliberations Congress identified the automatic trigger as the critical ingredient in the Deficit Control Act because it was "the disciplining agent," *id.*, S17389 (Dec. 11, 1985) (Sen. Gramm), "the sword of Damocles," *id.*, S17400 (Sen. Gorton), which would lead to "a more responsible budget," *id.*, S17401. Congress had mandated a balanced budget by law before,[56] but the "budget process ha[d] failed because it d[id] not have enough teeth in it," 131 Cong. Rec. S12647 (Oct. 4, 1985) (Sen. Boren). The enactment of the Deficit Control Act reflects Congress' judgment that "[w]e have got to have a trigger," *id.*, H9611 (Nov. 1, 1985) (Rep. Lott), so that "[f]or the first

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intent from the enactment of the fallback transforms legislation that was intended only to address a possible contingency into legislation that causes the contingency to occur. In order to avoid making Congess' enactment of a contingent fallback procedure a self-fulfilling prophecy, the severability decision must be made strictly on the basis of independent evidence of Congress' intent in enacting the reporting mechanism without regard to the fallback.

[55] The Executive branch has appreciated that the pivotal contribution of the Deficit Control Act to deficit reduction is its administrative mechanism: "The essence of [the Act] is that it provides an assurance that the deficit will decline. Previous efforts to set targets for the deficit lacked such an assurance because there were no procedures for enforcing the deficit targets." Office of Management and Budget, *Budget of the United States Government: Fiscal Year 1987,* H.R. Doc. No. 143, 99th Cong., 2d Sess. 2-15 (1986).

[56] *See, e.g.,* Pub. L. No. 96-389, §3, 94 Stat. 1551, 1553 (1980); Pub. L. No. 95-435, §7, 92 Stat. 1051, 1053 (1978) (codified at 31 U.S.C. 1103); *see also* Budget and Accounting Act of 1921, §202(a), Pub. L. No. 13, ch. 18, 42 Stat. 21 (codified at 31 U.S.C. 1105(c)) (requiring President to recommend action to balance budget).

time, the consequences of doing nothing will be worse than the consequences of doing something," *id.*, S17401 (Dec. 11, 1985) (Sen. Gorton).

"In exercising its power to review the constitutionality of a legislative act, a federal court should act cautiously [, because a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Regan v. Time, Inc.*, 104 S.Ct. at 3269. The Court should respect Congress' judgment that an administrative mechanism is essential to balancing the budget. The paramount national importance of the Act's administrative mechanism, compared to the far less significant role of the removal provision in the chartering of the Comptroller General's office, requires that any incompatibility between them be resolved by preserving the mechanism in the Act, along with the Comptroller General's other administrative duties over the past two-thirds of this century.

CONCLUSION

The declaratory order of the district court should be reversed.

Respectfully submitted,

MICHAEL DAVIDSON,
Senate Legal Counsel,

KEN U. BENJAMIN, JR.,
Deputy Senate Legal Counsel,

MORGAN J. FRANKEL,
Assistant Senate Legal Counsel.

March 1986.

(8) (8) (8)

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

HARRY R. VAN CLEVE
General Counsel

JAMES F. HINCHMAN
Deputy General Counsel

ROBERT P. MURPHY
Attorney-Adviser

U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548
Tel. (202) 275-5207

LLOYD N. CUTLER *
JOHN H. PICKERING
WILLIAM T. LAKE
RICHARD K. LAHNE
NEAL T. KILMINSTER

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for the Comptroller General of the United States

* Counsel of Record

March 19, 1986

12(8)

QUESTION PRESENTED

Whether it is unconstitutional for the Comptroller General, an independent officer of the United States appointed for a statutory term of years by the President by and with the advice and consent of the Senate, to perform administrative functions of a factfinding nature assigned to him by a 1985 law, merely because the 1921 law creating his office contains a provision for his removal for cause after hearing by enactment of a joint resolution presented to the President for approval or veto, when neither the President nor Congress has ever attempted to remove a Comptroller General for cause or otherwise and there has been no determination of their respective constitutional powers to do so.[1]

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[1] This appeal is from two cases that were consolidated in the court below. The parties in Civil Action No. 85-3945 were Representatives Mike Synar, Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Traficant, Jr. as plaintiffs; the United States as defendant; and the Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership Group of the United States House of Representatives (Speaker Thomas P. O'Neill, Jr., Majority Leader Jim Wright, Minority Leader Robert H. Michel, Majority Whip Thomas S. Foley, and Minority Whip Trent Lott) as intervening defendants. The parties in Civil Action No. 85-4106 were the National Treasury Employees Union as plaintiff and the same defendant and intervening defendants as No. 85-3945.

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BRIEF FOR APPELLANT
COMPTROLLER GENERAL OF THE UNITED STATES

OPINION BELOW

The opinion and order of the district court, which are not yet reported, are reproduced in the Joint Appendix ("J.A.") at 27, 81.

JURISDICTION

This appeal arises from two suits brought under section 274(a) of the Balanced Budget and Emergency Deficit Control Act of 1985 [2] for a declaratory judgment that portions of that statute are unconstitutional. The cases were consolidated and heard by a three-judge court, which entered its judgment in both cases on February 7, 1986 (J.A. 81). Appellant Comptroller General of the United States filed his notice of appeal in the district court that day (J.S. App. 1a-2a). The appeal was docketed on February 18, 1986, and this Court noted probable jurisdiction on February 24, 1986. This Court has jurisdiction under section 274(b) of the challenged statute (J.A. 163) and under 28 U.S.C. § 1252 (1982).

STATUTES AND CONSTITUTIONAL PROVISIONS

The challenged statute is set forth at J.A. 103. The Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 (1921), which established the office of the Comptroller General and prescribed the manner of his appointment and removal, is set forth at J.A. 92. Section 703 of Title 31, U.S. Code, which currently codifies the provisions relating to the appointment and removal of the Comptroller General, is set forth at J.A. 101. Article II, section 2, clause 2 of the Constitution, dealing with the appointment of officers of the United States, is set forth at J.A. 92.

STATEMENT

This case involves the constitutionality of the Balanced Budget and Emergency Deficit Control Act (the "Act" or

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[2] Pub. L. No. 99-177, 99 Stat. 1037, J.A. 103.

"1985 Act"),[3] a statute creating a new governmental mechanism designed to reverse the spiral of growing federal budget deficits the United States has experienced in recent years—deficits that have been rising at a rate threatening the Nation's economy, increasing more than sevenfold since 1979.[4]

Despite a widespread consensus that the deficits must be reduced, both Houses of Congress and the President have been unable to enact a formula of budget cuts and/or revenue increases that would achieve the needed reduction. To resolve this dilemma, the Act creates a mechanism that will automatically produce across-the-board reductions in specified categories of government spending, unless Congress enacts laws that achieve the deficit targets fixed in the Act by other means. The legislative history shows that the major purpose of this automatic feature is to induce the political compromises necessary to enact such laws. Over the six-year period from fiscal 1986 through fiscal 1991, the deficit targets shrink successively from $172 billion to zero.

The Comptroller General's Responsibilities Under the Act

The keystone of the Act is a delegation of administrative functions of a factfinding nature to the Comptroller General. The deficit reduction mechanism requires the Comptroller General, in a report delivered to the President and Congress, (1) to forecast the amount, if any, by which the deficit will exceed the statutory target for the coming fiscal year, and (2) to determine what, if any, reduction the Act requires to be made in each non-exempt category of federal spending in order to achieve the target.

The first of those determinations—the deficit forecast —requires the Comptroller General to project federal

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[3] Pub. L. No. 99-177, 99 Stat. 1037, J.A. 103.

[4] *See, e.g., Balanced Budget and Emergency Deficit Control Act of 1985: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 164 (1985).

budget outlays and receipts for the year on the basis of detailed assumptions set forth in the Act.[5] If the projected deficit exceeds the target deficit in the Act for that year by $10 billion or more ($0 in fiscal years 1986 and 1991), the Comptroller General must then make the second determination—the calculation of the amounts and percentages by which spending must be reduced in each federal spending account to eliminate the "deficit excess." [6] The Act prescribes detailed rules for making that calculation. The necessary reduction is first split evenly between defense and nondefense programs, with certain nondefense programs exempted; [7] then it is allocated among specific accounts.[8]

If the Comptroller General's report finds that reductions are required by the Act, the report "triggers" a statutory directive that the President issue a sequestration order reducing automatic spending increases and sequestering funds.[9] The Act requires the President to base his order on the Comptroller General's report.[10] The President's order becomes effective after thirty days, unless Congress meanwhile enacts a joint resolution (signed by the President or passed over his veto) meeting the Act's deficit target in some different way.[11] The Comp-

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[5] *See* Act §§ 251(a)(1), (2), (6), 251(b), J.A. 109, 109, 115, 116.

[6] *See* Act §§ 251(a)(2), 251(b), J.A. 109, 116. The Act establishes a maximum deficit reduction of $11.7 billion for fiscal 1986. Act § 251(a)(3), J.A. 110.

[7] Act § 251(a)(3)(B), J.A. 110.

[8] Act § 251(a)(3)(C), (D), (E), (F), J.A. 111-12.

[9] Act § 252(a)(1), J.A. 124; Conference Report, H.R. Rep. No. 433, 99th Cong., 1st Sess. 76 ("Conf. Report"), *reprinted in* 1985 U.S. Code Cong. & Ad. News 988, 994.

[10] Act §§ 252(a)(1), (3), 252(b)(1), J.A. 124, 128, 132; Conf. Report at 74, 76, 78. The President has limited discretion to allocate funds for defense spending in fiscal year 1986. Act § 252(a)(2), J.A. 125.

[11] Act §§ 252(a)(1), 254(b), J.A. 124, 139. In fiscal years after 1986, the reporting procedure will be followed a second time later in the fiscal year, to account for changes in laws and regulations since the first report cycle. Act § 251(c), J.A. 118.

troller General must submit a report to Congress and the President each year detailing the compliance of the President's sequestration order with the requirements of the Act.[12]

The role assigned to the Comptroller General in this process was a compromise between the Senate and the House. The original Senate-passed version of the Act assigned the forecasting and reporting function jointly to the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO").[13] The House was unwilling to give that role to the Director of OMB, who is under the direct control of the President. Instead, the House-approved version delegated the function solely to the Director of CBO, who is under the direct control of Congress, and who was to act "in consultation with" the Director of OMB.[14] Questions about the constitutionality of that arrangement led the Senate to propose what became the final solution: The function was assigned to the Comptroller General, who would receive and consider a joint report from the Directors of OMB and CBO and then make his report to the President and Congress based on his own "independent anallyis." [15]

The Comptroller General's "independent analysis" is to begin before he receives the Directors' report and is to include monitoring "all relevant data on an on-going basis." [16] He must give "due regard" to the Directors'

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[12] Act § 253, J.A. 134.

[13] 131 Cong. Rec. S13,093, S13,096 (daily ed. Oct. 10, 1985); *see id.* at S13,113-14 (Senate passage).

[14] 131 Cong. Rec. H9582, H9590 (daily ed. Nov. 1, 1985); *see id.* at H9614-15 (House approval); Conf. Report at 72.

[15] Act § 251(a), (b), J.A. 109, 116; Conf. Report at 84; *see id.* at 73-74. If the Directors fail to agree on any items, they must report the average of their differing figures as well as the figures each Director separately proposes for the items in question. Act § 251(a)(5), J.A. 115.

[16] Conf. Report at 84.

report and must "explain fully any differences between the contents of [his] report and the report of the Directors." [17] But his report, and not theirs, is the one on which the statute requires the President to act.[18]

The Act contains a fallback mechanism, which comes into play only if the Act's triggering mechanism is held invalid. Under the fallback, the Directors' report is submitted to Congress itself, which would then decide whether to enact a joint resolution meeting the deficit target in the Act.[19] Since this fallback depends on the passage of another law, it is essentially a return to the *status quo ante*.

The President signed the bill, noting in his approval message that he supported the bill's automatic reduction mechanism but that he doubted the constitutionality of assigning the reporting function to the Comptroller General. He expressed the view that "executive functions may only be performed by officers in the executive branch" and that the Comptroller General is an "agent[] of Congress, not [an] officer[] in the executive branch." [20]

The statutory process is well under way for fiscal 1986. The Comptroller General received the joint report of the Directors on January 15, 1986. His report, issued on January 21, 1986, found that the Act requires sequestrations in the amount of $11.7 billion this year.[21] The President issued his sequestration order on February 1,

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[17] Act § 251(b)(1), (2), J.A. 116, 117; Conf. Report at 74.

[18] Act § 252(a)(1), (3), 252(b)(1), J.A. 124, 128, 132; Conf. Report at 74, 76, 78.

[19] Act § 274(f), J.A. 165.

[20] Statement on Signing H.J. Res. 372 into Law, 21 Weekly Comp. Pres. Doc. 1490-91 (Dec. 12, 1985), *quoted in* Opinion at 33 n.22, J.A. 61.

[21] United States General Accounting Office, Budget Reductions for FY 1986, Report to the President and the Congress, 51 Fed. Reg. 2811, 2813 (1986).

1986. It became effective by the terms of the Act on March 1, 1986.[22]

The Proceedings Below

Plaintiffs invoked the judicial review provision in the Act by filing suits against the United States to challenge the Act's constitutionality. The Comptroller General, the Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives intervened as defendants. Motions to dismiss and for summary judgment were filed and argued. The United States, although a defendant in the actions, moved for summary judgment that the Act is unconstitutional on some of the grounds asserted by the plaintiffs, including the ground adopted by the district court.

The district court issued its opinion and judgment on February 7, 1986. It declared the Act unconstitutional insofar as it delegates what the court called "executive powers" to the Comptroller General, but rejected or found no need to consider all other constitutional challenges to the Act.

The district court based its ruling of unconstitutionality on its view that "executive powers" may not be conferred on the Comptroller General because he is an officer "removable by Congress." [23] The court assumed, without deciding, that the Comptroller General, who is appointed by the President by and with the advice and consent of the Senate, is an "officer of the United States" within the meaning of the Appointments Clause of the Constitution.[24] However, it regarded the Comptroller General as "removable by Congress" because a provision of the Budget and Accounting Act of 1921 ("1921

[22] Emergency Deficit Control Measures for Fiscal Year 1986, 51 Fed. Reg. 4291 (Feb. 4, 1986); Act § 252(a)(6)(A), J.A. 129.

[23] Order at 2, J.A. 82.

[24] U.S. Const. art. II, § 2, cl. 2, J.A. 92; *see* Opinion at 34-35 & n.23, J.A. 61.

Act"),[25] which established his office with a 15-year non-renewable term, states that he may be removed by impeachment or, after hearing, for cause by joint resolution of Congress.[26] Although a joint resolution, like a bill, must be presented to the President for his signature or veto,[27] the court treated the Comptroller General as removable unilaterally by Congress because of the possibility that a veto might be overridden by a two-thirds vote of both Houses.[28]

The district court ruled that this removal provision gives the Comptroller General a "presumed desire to avoid removal by pleasing Congress," creating a "here-and-now subservience to another branch" that is impermissible in an officer performing administrative duties.[29] In so ruling, the court rejected the Comptroller General's argument that removability *for cause* does not make an officer of the United States subservient to the removing authority.

The district court also rejected the Comptroller General's contention that any constitutional infirmity in the 1921 removal provision should be cured by striking that provision from the 1921 Act, not by invalidating the administrative duties conferred on the Comptroller General by the same 1921 Act and by subsequent laws including the 1985 Act. The court refused to consider whether the removal provision created an issue of constitutional incompatibility within the 1921 Act itself or,

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[25] Ch. 18, 42 Stat. 20 (1921) (codified at 31 U.S.C. §§ 701, *et seq.* (1982)), J.A. 92.

[26] *See* 31 U.S.C. § 703(e) (1982), J.A. 102. The 1921 Act included the phrase "and for no other cause and in no other manner." 1921 Act § 303, 42 Stat. at 24, J.A. 94. The Code revision enacted in 1982 deleted that phrase as "surplus." 31 U.S.C. § 703 (1982), note at 353.

[27] U.S. Const. art. I, § 7, cl. 3.

[28] Opinion at 31 & n.21, J.A. 58.

[29] *Id.* at 30, J.A. 57.

if so, whether that provision should be severed. The court limited its inquiry to the 1985 statute, and presumed that Congress in 1985 would not have chosen the Comptroller General for the reporting function but for the "subservience" produced by the 1921 removal provision. It cited no legislative history of either Act to support that presumption. Nor did the court consider whether a removal provision reserving a role for Congress is unconstitutional *per se* for *any* officer of the United States, whatever functions he performs, and hence severable from the balance of the 1921 Act.[30]

This appeal followed. As the Act requires, the district court stayed its judgment pending the appeal.[31]

SUMMARY OF ARGUMENT

I. The district court held that the removal provision of the 1921 Act creates a subservience of the Comptroller General to Congress and is therefore incompatible with the 1985 Act's delegation of administrative functions to the Comptroller General. It concluded that the 1985 delegation is therefore unconstitutional. In reaching this result, the district court did not consider the legislative history of the 1921 Act or the validity of the removal provision in the context of the 1921 Act.

The district court erred in failing to examine the removal provision as part of the 1921 Act. That is the logical place to begin in determining the effect of the provision on the constitutionality of the 1985 Act. If the removal provision did not make the Comptroller General subservient to Congress in performing his administrative functions under the 1921 Act, it could have no such effect on his 1985 Act functions. If the removal

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[30] *Id.* at 32-34, J.A. 59-61. In other portions of its opinion, the district court rejected the argument of the United States that the congressional plaintiffs lack standing and plaintiffs' argument that the Act impermissibly delegates legislative power. *Id.* at 12, 27-28, J.A. 37, 54-55.

[31] Order at 2, J.A. 82; *see* Act § 274(e), J.A. 165.

provision is unconstitutional and not a valid part of the 1921 Act, it can have no bearing on the further delegation made by the 1985 Act.

The district court said it was unaware of any case in which a court had "even considered choosing" which of two constitutionally incompatible statutes to invalidate. Rather, it said, courts always "set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." [32] But in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), this Court did just what the district court declined to do here. In *Glidden*, this Court was asked to strike down a statute authorizing the temporary assignment to Article III courts of judges of certain other courts. Plaintiffs claimed those other courts were not Article III courts because of earlier statutes relating to their jurisdiction that had been construed as being incompatible with Article III status. The Court did not strike down the assignment statute that "allegedly authorize[d] [the plaintiff's] injury in fact." Instead, it ruled that the earlier statutes would have to fall, because Congress had intended to establish those courts as Article III courts from their inception. When the court below perceived a constitutional problem, it should have followed the same principle.

II. Had the district court examined the history and constitutionality of the 1921 Act, it would have found that the purpose of that Act was to make the new General Accounting Office ("GAO") independent of both political branches. The Act made the Comptroller General, as GAO's head, an independent officer of the United States duly appointed for a 15-year nonrenewable term by the President by and with the advice and consent of the Senate. As an independent officer, the Comptroller General was delegated functions performed since 1789 by the Comptroller of the Treasury—functions that were clearly administrative as well as judicial in nature.

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[32] Opinion at 32, J.A. 59.

Those functions included settling the Government's accounts, in a manner binding on the executive departments, and suing to collect the Government's claims.

The main purpose of the removal provision was to make the Comptroller General an independent auditor or watchdog, in contrast to his predecessor in the Treasury Department, whom Congress regarded as subservient to the President because the President could remove him at will. Congress chose to authorize removal only by joint resolution for cause as a way to protect the Comptroller General's independence from the President, not to make him subservient to Congress. Indeed, several members expressed the view that the procedural obstacles to removal for cause by joint resolution were so great that as a practical matter a Comptroller General once appointed would remain in office throughout his term.

In any event, the legislative history of the 1921 Act makes clear the intent of Congress that if the removal provision were held invalid it should be severed to preserve the balance of the 1921 Act. In that event, it could have no effect on the constitutionality of the 1985 delegation of functions to the Comptroller General.

III. In the light of this history and *Glidden*, we submit there are only three logical methods of adjudicating the effect of the 1921 removal provision on the constitutionality of the 1985 Act. We submit also that under any of the three, the 1985 Act's delegation of the reporting function to the Comptroller General is constitutional.

1. *First, the Court could conclude that there is no constitutional incompatibility between the 1921 removal provision and the 1921 and 1985 delegations, because the power to remove an officer of the United States for cause after hearing does not create a "subservience" of that officer to the removing authority.*

In *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), this Court found that Congress had created the Federal Trade Commission to be independent of the President, even though the statute authorized him to re-

move Commissioners for cause. Since the President's retained power to remove for cause created no subservience to the President as the removing authority, it should follow that the reserved power of Congress to remove the Comptroller General solely for cause by enacting a joint resolution creates no subservience to Congress. The district court nonetheless "presumed" subservience, relying on *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). It analogized the removal clause of the 1921 Act to the 14-year term of the bankruptcy judge, which created a possibility of nonrenewal and was incompatible with Article III status. It said that just as the possibility of nonrenewal created a subservience of the bankruptcy judge to the President, the possibility of removal for cause creates "here-and-now subservience" of the Comptroller General to Congress. But to suggest that a tenure or removal provision impermissible for an Article III judge creates subservience that is impermissible for other officers of the United States disregards the special constitutional status of Article III judges. The district court's reasoning would invalidate *all* statutory fixed terms for the numerous independent officers of the United States performing administrative duties, because those fixed terms would create "subservience" to the Senate as well as to the President with whom the Senate shares the reappointment power. Under the district court's theory of subservience to another branch, the longstanding practice of giving independent officers fixed, renewable terms would itself have to be struck down.

The district court's presumption that the removal provision makes the Comptroller General "subservient to another branch" is also unjustified in fact. It disregards almost a century of history, since the creation of the first independent agency, in which neither the President nor Congress has exercised the power to remove an independent officer for statutorily prescribed cause. And it ignores the fact that the Comptroller General has consistently demonstrated his independence of Congress as well as of the President.

The district court further presumed that the 1985 Congress would not have delegated the reporting function to the Comptroller General but for the "subservience" produced by the removal provision. But the 1985 legislative history does not substantiate that presumption. Indeed, our research discloses no reference whatever in that history to the never-invoked removal provision of the 1921 Act. Rather, Congress in 1985 chose the Comptroller General because of his independence and his constitutional capacity, as an officer of the United States, to perform administrative functions that CBO could not. The Senate floor leaders even referred to GAO, which the Comptroller General heads, as an "executive" agency, in contrast to an agency (like CBO) under the control of Congress.

2. *Second, if this Court should agree with the ruling below that administrative functions cannot be delegated to an officer of the United States "removable by Congress," it could sever the removal provision from the 1921 Act.*

The 1920 and 1921 Congresses were aware of the constitutional problem posed by the removal provision, because in 1920 President Wilson had vetoed a version of the same bill providing for removal by concurrent rather than joint resolution. In his veto message, President Wilson asserted that the President has the sole power to remove any presidential appointee, and that Congress cannot share in the removal power. As the legislative history of the 1920 and 1921 bills shows, Congress intended the Comptroller General's statutory functions to survive even if the removal provision should be ruled invalid. Once severed, the removal provision could have no bearing on the constitutionality of the 1985 Act.

The district court suggested, without deciding, that even apart from the removal provision, the functions delegated to the Comptroller General by the 1985 Act are too "executive" to be performed by an officer independent of the President. That suggestion cannot be squared with *Humphrey's Executor* and subsequent decisions uphold-

ing delegations to independent officers of functions involving broader policy judgments than the merely factfinding judgments involved here. It also disregards the district court's own findings that the functions delegated by the 1985 Act are of a factfinding nature and do not call for "a single *policy* judgment."

There may be "executive powers" that can be assigned only to officers removable at the pleasure of the President, such as the conduct of foreign policy that was the focus of the congressional decision of 1789. But the factfinding functions assigned to the Comptroller General by the 1985 Act are not among them.

3. *Third, this Court could decide that, apart from the issue of subservience to another branch, the removal provision of the 1921 Act is unconstitutional on its face for the reason stated by President Wilson, and could then sever the provision from the 1921 Act.*

This was the view adopted by the majority in *Myers v. United States*, 272 U.S. 52 (1926), six years after President Wilson's veto message. When this Court later limited the *Myers* ruling to "purely executive officers," [33] it upheld a statute that authorized the President to remove Federal Trade Commissioners for cause, not a statute that involved Congress in the removal process. This Court has not considered such a statute since its ruling in *Myers*. If this Court should decide now that the President may insist on the sole power to dismiss for cause his appointee to an independent office, it should strike the 1921 removal provision as invalid on its face and sever it from the remainder of the 1921 Act. In that event, of course, the removal provision would have no bearing on the constitutionality of the 1985 Act.

IV. Any of these three methods of disposition would sustain the constitutionality of the Comptroller General's functions under the 1985 Act. In our submission, the narrowest and most appropriate is the first. If this Court agrees that the 1921 removal provision did not then and

[33] *Humphrey's Executor*, 295 U.S. at 627-28.

does not now create an impermissible subservience, there is no need to decide whether the President may insist on an exclusive constitutional power to remove the Comptroller General for cause. That issue can be left for the day, which may never come, when either the President or Congress attempts such a removal.

In any event, we urge the Court to adopt one of the three suggested methods of disposition and reverse the ruling below. Otherwise, a grave and unnecessary restraint would be placed on the capacity of our constitutional system to adopt innovative solutions to the increasingly complex problems that modern democratic governments must address. The concept of the independent officer of the United States appointed for a fixed term is an example of such an innovation. While there is room for debate whether a century of experience has confirmed the utility of all the independent offices Congress has created, it is important that our system has been flexible enough to allow this experiment, and that the courts did not condemn it at birth as an unconstitutional inroad on the separation of powers.

These principles apply to the 1985 Act. The linchpin of this innovative legislation is its delegation of the reporting function to an independent officer subservient to neither the President nor Congress. It may or may not succeed in reversing the governmental cancer of budget deficits that has been growing for two decades and may soon become inoperable. An overly rigid theory of separation of powers should not be invoked to abort this potentially important idea before we can see how it works in practice. Thirty-two states have already issued calls for a constitutional convention to adopt an amendment mandating a balanced budget. If the Constitution we have is ruled too inflexible to accommodate the experiment of the 1985 Act, which can be promptly modified or repealed by another statute if it proves to be a bad idea, the result may be to add momentum to a convention and to unwise constitutional amendments that would take much longer to reverse.

ARGUMENT

I. BEFORE DECIDING THE EFFECT OF THE 1921 ACT'S REMOVAL PROVISION ON THE CONSTITUTIONALITY OF THE TRIGGER MECHANISM IN THE 1985 ACT, THE DISTRICT COURT SHOULD HAVE CONSIDERED THE LEGISLATIVE HISTORY OF THE 1921 ACT AND THE VALIDITY OF THE REMOVAL PROVISION IN THE CONTEXT OF THAT ACT.

The district court made a fundamental error in refusing to consider the constitutionality and severability of the 1921 removal provision in the context of the 1921 Act. The court ruled that the removal provision is incompatible with the 1985 delegation of administrative or "executive" functions to the Comptroller General.[34] But it failed to consider the validity of the removal provision within the 1921 Act itself. Since the 1921 Act also delegated administrative functions to the Comptroller General, the same potential for incompatibility existed within the 1921 Act. If the removal provision did not make the Comptroller General subservient to Congress in performing

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[34] The district court used the term "executive powers," an expression that introduces some ambiguity into its opinion. This Court in *Buckley v. Valeo*, 424 U.S. 1, 141 (1976), used the terms "administrative functions" and "administration and enforcement of public law" to refer generally to the class of functions that may be performed only by an "Officer of the United States" appointed under the Appointments Clause. This Court described such functions generically as "the performance of a significant governmental duty exercised pursuant to a public law." 424 U.S. at 141; *see id.* at 126. We use the term "administrative functions" in that sense.

To avoid ambiguity, we reserve the term "executive" for powers that must be exercised by what this Court has termed "purely executive officers"—officers in the executive departments, who are under the direction of the President and subject to removal at his pleasure. *See Humphrey's Executor v. United States*, 295 U.S. 602, 631-32 (1935). Some functions may be so inherently "executive" that the Constitution would not allow them to be delegated to an independent officer. However, this Court's decisions make plain that none of the functions assigned to the Comptroller General by the statutes at bar is in that category. *See infra* pp. 42-47.

his 1921 Act functions, it could have no such effect on his 1985 Act functions. And if it is invalid as part of the 1921 Act, it could have no effect on the 1985 Act.

The district court refused to consider these questions. It said it was unaware of

> "any case in which a court confronted with separate statutes, constitutionally incompatible in combination, has even considered choosing which of the two to invalidate . . . . To the contrary, as the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate, the courts set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." [35]

However, in *Glidden Co. v. Zdanok*,[36] an important "authorization" case, this Court did just the opposite. In *Glidden*, the Court was asked to strike down the assignment of a Court of Claims judge and a Court of Customs and Patent Appeals judge to sit temporarily on Article III courts under a 1958 statute that expressly authorized such assignments. The ground for challenging the assignment statute was that this Court had expressly ruled in two prior cases (*Bakelite* [37] and *Williams* [38]) that those two courts did not meet the constitutional standards for an Article III court. But this Court did not, as the district court's approach would require, strike down the assignment statute that "allegedly authorize[d] the plaintiff's injury in fact." Instead, it upheld that statute because it found that, contrary to its earlier decisions, Congress had intended the two courts to be Article III courts from their inception.

To reach that result, the Court in *Glidden* had to deal with earlier statutes that had been construed as inconsistent with Article III status for those courts. In *Wil-*

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[35] Opinion at 32, J.A. 59.

[36] 370 U.S. 530 (1962) (plurality opinion).

[37] *Ex parte Bakelite Corp.*, 279 U.S. 438 (1929).

[38] *Williams v. United States*, 289 U.S. 553 (1933).

liams, it had construed a 1932 statute as authorizing salary cuts for the judges of those courts; [39] and in *Bakelite* it had interpreted the jurisdictional statutes of those courts as including advisory opinion functions that were inconsistent with Article III status.[40] The plurality opinion in *Glidden* declared expressly that "if necessary, the particular offensive [advisory opinion] jurisdiction" contained in the jurisdictional statutes, rather than the Article III status of the two courts, "would fall." [41] Moreover, since the "particular offensive jurisdiction" of the Court of Claims was part and parcel of the basic jurisdictional statute of that court, the *Glidden* plurality necessarily found it severable from the remainder.[42]

In making those rulings, the Court resolved an incompatibility between provisions of separate statutes by considering how best to achieve the congressional intent. The course it chose was to declare invalid and sever provisions of statutes other than the one that "allegedly authorize[d] the plaintiff's injury in fact." [43]

The cases cited by the lower court neither dictate nor justify its contrary course.[44] Nor did the court point to any logical connection between the basis asserted for

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[39] *See* 289 U.S. at 560, 571, 581.

[40] 279 U.S. at 454, 460.

[41] 370 U.S. at 583.

[42] *See* Judicial Code of 1911, Pub. L. No. 61-475, 36 Stat. 1135, 1138. Justice Clark, in a concurring opinion in which Chief Justice Warren joined, stated that the two courts should advise Congress that they could no longer render advisory opinions. 370 U.S. at 587, 589. Thus, a majority of the Court ruled that the advisory jurisdiction would have to fall.

[43] *See also Bakelite*, 279 U.S. at 460.

[44] *See* Opinion at 32, J.A. 59, citing *Springer v. Government of the Philippine Islands*, 277 U.S. 189 (1928); *Myers v. United States*, 272 U.S. 52 (1926); *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). In each of those cases, the asserted incompatibility existed within a single statute, not between the statute that the plaintiff(s) attacked and some other statute.

standing and the appropriate relief. Where, as here, it is the combination of two statutes that is asserted to be unconstitutional, the choice of which to invalidate should not depend on which is first challenged. Particularly where a subsequent statute gives new functions to an officer created by an earlier one, the new statute should be read *in pari materia* with the organic statute defining the office, as this Court did in *Glidden*. If it had followed the approach taken in *Glidden*, the district court would have examined the validity of the removal provision as part of the 1921 Act. If it had then found any incompatibility between provisions of that Act, it should have considered what method of eliminating that incompatibility would best achieve the objectives of the 1921 and 1985 Congresses. That method, as we show below, would be to strike the removal clause.

II. THE 1921 ACT ESTABLISHED THE COMPTROLLER GENERAL AS AN INDEPENDENT OFFICER OF THE UNITED STATES CAPABLE OF PERFORMING ADMINISTRATIVE FUNCTIONS; ITS REMOVAL PROVISION HAS NEITHER THE PURPOSE NOR THE EFFECT OF MAKING THAT OFFICER SUBSERVIENT TO CONGRESS.

The court below sought to minimize the impact of its ruling by "posit[ing]" for purposes of its decision that all of the Comptroller General's functions under the 1921 Act involve only "legislative . . . aid." [45] But that proposition cannot survive scrutiny of the 1921 statute or of its legislative history. The 1921 Act gave the Comptroller General important administrative functions that present the same issue of incompatibility raised by the court below. If the district court had considered that issue in the context of the 1921 Act, we submit that it would have found no incompatibility, because the removal provision was not intended to make the Comptroller General subservient to Congress and has not done so.

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[45] Opinion at 43, J.A. 71 (quoting *Humphrey's Executor*, 295 U.S. at 628).

A. The 1921 Act Transferred to the Comptroller General Administrative and Other Functions that Had Been Performed by Officers in the Treasury Department Since 1789.

The 1789 statute creating the Treasury Department established within it a Comptroller of the Treasury, who was responsible for ensuring that federal moneys were properly spent, received, and accounted for. His functions plainly involved the administration of the laws. They included: (1) settling all accounts of the federal government and supervising the recovery of debts owed to it; (2) certifying balances that were conclusive on the executive departments; (3) suing for all delinquencies of revenue officers and for all debts owed to the federal government; (4) making advance determinations on questions of payment when requested by disbursing officers and department heads; and (5) prescribing the forms of keeping and rendering public accounts of the federal government. The 1789 statute and its successors detailing these functions are summarized in Appendix A to this Brief.

In 1921, these mixed administrative and judicial functions—developed over some 130 years and performed by officers in an executive department—were transferred to a new and independent General Accounting Office ("GAO") headed by the Comptroller General.[46] This was one of two major reforms instituted by the 1921 Act.[47] The other was to require the Executive Branch for the first time to prepare unified annual budgets for the federal government—a task given to a new Bureau of the Budget under the direction of the President.

At the same time that Congress brought the Executive Branch into the budget process, it decided to insulate from

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[46] Ch. 18, 42 Stat. 20 (1921). The 1921 Act abolished the office of Comptroller of the Treasury and the officers under him and vested in GAO "[a]ll powers and duties . . . [previously] conferred or imposed by law" on them. 1921 Act §§ 301, 304, 310, 42 Stat. at 24-25, J.A. 93, 94, 97.

[47] 61 Cong. Rec. 975 (1921) (remarks of Rep. Snell).

presidential direction the job of ensuring that federal officials properly expend public funds. It expressly declared that the new GAO "shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States." [48] Section 304 of the 1921 Act stressed that the Comptroller General's duties were to be "exercised without direction from any other officer." [49]

B. The Main Purpose of Creating the Comptroller General Was to Place These Functions in an Officer Independent of Both the President and Congress.

The decision to create an independent Comptroller General was based on unhappy experience with the prior system in which the Comptroller was under presidential control. That experience was summed up by Representative Good, the Chairman of the House Select Committee on the Budget and the floor manager of the bills that became the 1921 Act:

> "I think it was under the administration of President Cleveland that the President desired to use a certain appropriation for a given purpose, and was told by his Comptroller of the Treasury, who happened to be a little independent of this system, that he could not do it. But the President insisted and finally said, 'I must have that fund, and if I can not change the opinion of my comptroller, I can change my comptroller.' With less independence all comptrollers, no matter to which political party they owe allegiance, have been forced to face the same practical situation." [50]

The Committee intended "that the Comptroller General should be something more than a bookkeeper or accountant; that he should be a real critic." [51] To ensure that

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[48] 1921 Act § 301, 42 Stat. at 23 (codified at 31 U.S.C. § 702 (1980)).

[49] *Id.* § 304, 42 Stat. at 24.

[50] 61 Cong. Rec. 982 (1921).

[51] *Id.* at 1090.

result, the Comptroller General was given a term of 15 years, during which he is not removable by the President alone but only by impeachment or, for cause, by joint resolution.[52] He may not be reappointed, thus removing any temptation to curry reappointment.[53] The 1921 Act thus reflected the same concern expressed by James Madison about the Comptroller's function when the Treasury Department was created in 1789:

> "It will be necessary . . . to consider the nature of this office, to enable us to come to a right decision on the subject; in analyzing its properties, we shall easily discover they are not purely of an executive nature. It seems to me that they partake of a judiciary quality as well as executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of the claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character, and there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the executive branch of the Government."[54]

It is noteworthy that Madison expressed this view only a week after he had convinced the House that the President should have an unfettered power to remove the Secretary of State at pleasure.[55]

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[52] 1921 Act § 303, 42 Stat. at 24 (codified at 31 U.S.C. § 703(b) (1982)), J.A. 101.

[53] 1921 Act § 303, 42 Stat. at 24 (codified at 31 U.S.C. § 703(b) (1982)), J.A. 101.

[54] 1 Annals of Cong. 635-36 (1789) (J. Gales ed. 1834). Madison proposed that the Comptroller of the Treasury be given a limited term of years, to ensure h's independence by balancing the President's power to remove him against the Senate's power to refuse to confirm his reappointment. *Id.* Congress did not adopt the proposal.

[55] 1 Annals of Cong. 380, 461-64, 495-97, 578-82 (J. Gales ed. 1789, *relied on in Myers*, 272 U.S. at 109-36, *discussed infra* pp. 47-48.

Over the years, Congress has given the Comptroller General additional administrative or judicial functions for which his in-

C. The 1921 Removal Provision Has Neither the Purpose Nor the Effect of Making the Comptroller General Subservient to Congress.

The lower court found that the 1921 removal provision gives the Comptroller General a "presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems." [56] The district court "presumed" that the "purpose" and effect of the removal provision was to cause "the Comptroller General to look to the legislative branch rather than the President for guidance." [57] As to the purpose of the provision, the district court's presumption is refuted by the legislative history of the 1921 Act. As to the legal and factual effect of the provision, the ruling is inconsistent with this Court's decisions and with the experience of nearly a century

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dependence and expertise make him suitable. *See, e.g.*, 2 U.S.C.A. § 687 (West 1985) (duty to bring suit to require release of impounded budget authority under Impoundment Control Act of 1974); 42 U.S.C. § 6384(a) (1982) (duty to impose and collect civil penalties under Energy Policy and Conservation Act of 1975); 15 U.S.C. § 1862 (1982) (member of Chrysler Corporation Loan Guarantee Board); 45 U.S.C. § 711(d)(1)(C) (1982), *as amended by* Pub. L. No. 98-181, tit. II, § 2003(c)(1), 97 Stat. 1297 (1983) (member of Board of Directors of United States Railway Association); 44 U.S.C. § 3512 (1976) (authority to minimize burdens of information collection procedures imposed by other independent regulatory agencies), *repealed by* Pub. L. No. 96-511, 94 Stat. 2822 (1980); 31 U.S.C.A. §§ 3551-56 (West Supp. 1985) (authority to consider bid protests under Competition in Contracting Act of 1984). The last statute codifies and strengthens the bid protest procedures previously followed by the Comptroller General. *See generally* 44 Comp. Gen. 221, 223 (1964); 4 *Report of the Commission on Government Procurement* 40-41 (Dec. 1972).

The Comptroller General also played a significant role in administering federal election campaign reporting requirements under the Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431-54 (Supp. II 1972), *repealed in part by* Pub. L. No. 93-443, 88 Stat. 1272 (1974)—a role implicitly approved in *dicta* by this Court in *Buckley v. Valeo*, 424 U.S. at 128 n.165. *See infra* pp. 29, 45 & n.137.

[56] Opinion at 30, J.A. 57.

[57] *Id.* at 31, J.A. 58.

under statutes allowing removal of independent officers for cause.

1. ***The purpose of the 1921 removal provision was to ensure the Comptroller General's independence from the President, not to make him subservient to Congress.***

The congressional debates on the bills that led to the 1921 Act make clear that Congress did not intend the removal provision to create a "subservience to another branch." The purpose of that provision was the opposite —to secure for the Comptroller General the maximum degree of independence possible.

The 1921 Act began as a bill (H.R. 9783) introduced in the House of Representatives in 1919.[58] Both Houses passed that bill in 1920, with a provision authorizing removal for cause by concurrent resolution.[59] President Wilson vetoed the bill on June 4, 1920, asserting that the removal provision was unconstitutional because Congress could neither deny the President the exclusive power to remove his appointees nor share in the removal power itself.[60] S. 1084, the bill ultimately signed into law, was enacted in the next Congress. It provided for a 15-year nonrenewable term and removal by joint resolution.[61] In that form, S. 1084 was signed into law by President Harding.[62]

The proponents of H.R. 9783 made clear from the outset that the Comptroller General was to be an officer of

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[58] H.R. 9783, 66th Cong., 1st Sess., 58 Cong. Rec. 6533 (1919). Appendix B sets out relevant legislative history materials for the 1921 Act and its predecessor bills. It also sets out the removal provisions from the various bills, as well as the text of President Wilson's 1920 veto message.

[59] That bill provided indefinite tenure during good behavior, rather than a 15-year nonrenewable term as in the final 1921 Act. 59 Cong. Rec. 7662 (1920).

[60] 59 Cong. Rec. 8609-10 (1920); App. B at 3b-4b.

[61] S. 1084, 67th Cong., 1st Sess., 61 Cong. Rec. 1783, 1784-85 (1921).

[62] 61 Cong. Rec. 2500 (1921).

the United States and therefore had to be appointed as provided in the Appointments Clause. Early in the debates, Representative Byrns emphasized: "This officer, who is to be known as comptroller general, and his assistant must, under the Constitution, be appointed by the President . . . ." [63] That proposition was reiterated throughout the debates leading to passage of the bill.[64]

After President Wilson's veto and Representative Good's reintroduction of the legislation, the following colloquy occurred:

> "Mr. GOODYKOONTZ. Does not he think that the comptroller general would be rather an agent or a mere arm of Congress, which in itself has the power to select committees or agencies to gather information for it, and does not come within the category of general officers contemplated to be beyond the jurisdiction of Congress itself?
>
> "Mr. GOOD. It was the opinion of the committee that framed the law that the officer we were creating here was an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution." [65]

Congress never deviated from this view. Congress intended the Comptroller General to be a duly appointed officer of the United States; and this Court in *Buckley v. Valeo* recognized that he is one.[66]

The point of contention was whether and how Congress could protect the new officer from removal at the pleasure of the President. The whole purpose of creating the office of Comptroller General was to make him independent, and therefore he had to be free from the threat of discretionary removal by the President. Although *Myers* was still in the future, this Court had

[63] 58 Cong. Rec. 7088 (1919).

[64] *E.g.*, *id.* at 7211 (Rep. Temple), 7274 (Rep. Good).

[65] 59 Cong. Rec. 8612 (1920).

[66] 424 U.S. at 128 n.165 (Comptroller General "is appointed by the President in conformity with the Appointments Clause").

already signalled its view that the President's power to remove at pleasure could be restricted, if at all, only by a statute that explicitly denied him that power.[67] Congress, in providing for removal only for cause by concurrent resolution and then by joint resolution, "and for no other cause and in no other manner," believed it was being sufficiently explicit.[68] It was trying to safeguard the Comptroller General's status as an independent officer of the United States, subservient to neither the President nor Congress.

The proponents of the removal provision repeatedly emphasized that it gave the Comptroller General protection analogous to that afforded federal judges because of his "semi-judicial" position—an objective clearly inconsistent with any intent to create a subservience to Congress.[69] Moreover, the proponents had little doubt that, if valid, the provision would operate as intended—protecting against presidential control without creating congressional control:

> "Mr. SIMS. I appreciate the attempt to take this matter away from consideration as a political matter; but does the gentleman think that the President is more likely to act from partisan considerations

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[67] *Shurtleff v. United States*, 189 U.S. 311 (1903).

[68] Representative Good discussed *Shurtleff* in the debates, quoting this Court's statement that a limitation of the presidential removal power would "require very clear and explicit language." 189 U.S. at 315, *quoted in* 59 Cong. Rec. 8612 (1920). He then quoted the bill's removal provision and declared: "I submit that it is not possible for the human tongue to frame a provision that is more explicit and definite than that. We have not in this language drawn a provision that can be misconstrued by anyone. It is just as clear, it is just as forceful, as language can make it." *Id.*; *see also* 61 Cong. Rec. 983 (1921) (Rep. Good) (discussing removal cases); *id.* at 990-91 (Rep. Connally) (discussing *Shurtleff* and other removal cases).

[69] *E.g.*, 61 Cong. Rec. 1079 (Rep. Good) (1921); 59 Cong. Rec. 8610 (1920) (Rep. Good); 58 Cong. Rec. 7282 (1919) (Rep. Good); *id.* at 7136 (Rep. Hawley); *id.* at 7131 (Rep. Good).

than would a partisan Congress, where both Houses are of the same political party?

"Mr. GOOD. That is one of the reasons why we provided in the law the causes for removal, and the only causes are inefficiency, incapacity, neglect of duty, malfeasance in office, or some offense that involves moral turpitude." [70]

Indeed, some Members objected that too much protection was afforded by the removal provision. They argued that in practice it would guarantee the Comptroller General tenure for his full term because the required "trial[s]" in both Houses would create a "never-ending proceeding." [71]

To emphasize the Comptroller General's independence from the President, the proponents of the bills sometimes referred to him as an "arm" or "agent" of Congress. Those terms were frequently used at the time, not to indicate subservience to the wishes of Congress, but to express in shorthand form the proposition that an officer was to perform statutorily prescribed functions, with protection against discretionary removal by the President.

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[70] 59 Cong. Rec. 8612 (1920); *see* 61 Cong. Rec. 978 (1921) (Rep. Fess) ("His term of office does not depend upon the favor of anyone . . . . His tenure is not contingent, hence his conduct is independent . . . ."); 58 Cong. Rec. 7282 (1919) (Reps. Bland and Good).

[71] *E.g.*, 58 Cong. Rec. 7279-80 (1919) (Rep. Candler); *id.* at 7205-06 (Rep. Steagall); 61 Cong. Rec. 1083-84 (1921) (Rep. Parker). Other Members believed that removal by concurrent resolution would be comparatively simple. It is apparent that at least some of these Members believed that the concurrent resolution would not require presidential signature. *See, e.g.*, 58 Cong. Rec. 7211 (1919) (Rep. Temple); 61 Cong. Rec. 996 (1921) (Rep. Stevenson). On the other hand, Representative Good expressed the view that a concurrent resolution removing a Comptroller General would have the force of law, and as such would require presidential signature; thus, to avoid confusion, the House conferees later agreed to the Senate's suggestion to substitute "joint" for "concurrent" in the final Act. 61 Cong. Rec. 1855 (1921).

Examples of this usage can be found in Justice Sutherland's description of the Federal Trade Commission as an "agency of the legislative and judicial departments" [72] and in the many references to the Interstate Commerce Commission as an "arm" of Congress.[73] Professor Cushman, based on an extensive study, found those terms to be merely conclusory synonyms for "independence." [74] It is in this sense of "independence" that the proponents of the 1921 Act must be understood, and it was to this independence that the critics of the 1921 Act objected. For example, Solicitor General Beck in the *Myers* case attacked the 1921 removal provision as unconstitutional because the Comptroller General was, in his view, an "official of the executive department" who should be removable by the President at will.[75]

2. *This Court's decisions foreclose any inference that a statutory power to remove only for cause makes an officer subservient to the removing authority.*

The salient feature of the 1921 removal provision is its limited scope. Apart from impeachment, a Comptroller General can be removed during his 15-year term only for cause, after hearing, by a joint resolution passed by both Houses of Congress and signed by the President.

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[72] *Humphrey's Executor*, 295 U.S. at 630.

[73] Cushman, *The Constitutional Status of the Independent Regulatory Commissions* (pt. 1), 24 Cornell L.Q. 13, 13-14 (1938); *id.* (pt. 2), 24 Cornell L.Q. 163, 165 n.11, 167 (1939). Chief Justice Hughes even referred to the Secretary of Agriculture as an "agent of Congress" in performing his functions under the Packers and Stockyards Act. *Morgan v. United States*, 298 U.S. 468, 479 (1936). This Court brushed aside a recent attempt to give such terms legal significance when it stated that, notwithstanding a characterization of the Comptroller General as a "legislative officer," his appointment is made pursuant to the Appointments Clause. *Buckley v. Valeo*, 424 U.S. at 128 n.165.

[74] Cushman, *supra*, at 165-67.

[75] Substitute Brief for the United States on Reargument 96, 99-100 (Apr. 13, 1925), *Myers*.

If the President opposes removal and vetoes the resolution, an override requires passage again by a two-thirds vote of both Houses.[76] As a practical matter, removal in this manner would involve more participants and be more difficult than removal for cause by the President acting alone, which is the method expressly authorized by the statutes creating the positions of many other independent officers.[77] It is not facially apparent that the possibility of removal for cause by joint resolution after hearing makes an officer subservient to the removing authority.

Humphrey's Executor strongly implies that such a possibility does not create subservience. In upholding the power of Congress to permit presidential removal of Federal Trade Commissioners only for cause, the Court there stressed the congressional intent that Commissioners be "free from 'political domination or control' or the 'probability or possibility of such a thing.'"[78] The Court found that the statute achieved this objective. The Court clearly did not believe that the President's power to remove Commissioners for cause made them subservient or impaired their "free[dom] from executive control."[79] It is equally difficult to see how a congressional power to remove the Comptroller General for cause by joint resolution, which is subject to greater procedural constraints than the presidential removal clause before the Court in *Humphrey's Executor*, creates a "subservience" to Congress.

This Court's decisions in *Wiener v. United States*[80] and *Buckley* also conflict with the lower court's reason-

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[76] 31 U.S.C. § 703(e)(1) (1982), J.A. 102; *see* U.S. Const. art. I, § 7, cl. 3.

[77] Even removal by impeachment requires a two-thirds vote only in the Senate, after a mere majority vote of the House, and requires no action by the President. *See* U.S. Const. art. I, § 2, cl. 5; *id.* art. I, § 3, cl. 6.

[78] 295 U.S. at 625 (quoting floor debates).

[79] *Id.* at 628.

[80] 357 U.S. 349 (1958).

ing. In *Wiener*, the Court found that Congress intended the War Claims Commission " 'to exercise its judgment without the leave or hindrance of any other official or any department of the government.' "[81] To achieve that end, the Court inferred that the statute, which was silent on removal, barred removal at the pleasure of the President. And *Buckley*, in holding that administrative functions under the election statute could be performed only by officers appointed under the Appointments Clause, referred specifically to the Comptroller General as an officer who could perform those functions—and who had done so under an earlier version of that statute.[82] The Court made no reference to the provision of the 1921 Act making the Comptroller General removable for cause by joint resolution.[83]

The district court sought support for its presumption of subservience from this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*[84] But that case was very different from this one. This Court found there that a statute creating the new office of bankruptcy judge plainly denied the judges Article III status, because it gave them 14-year terms, made their salaries subject to diminution, and authorized their removal for cause by the judicial council of the circuit in which they served.[85] The district court here analo-

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[81] *Id.* at 353 (quoting *Humphrey's Executor*, 295 U.S. at 625-26).

[82] 424 U.S. at 128 n.165; *see supra* note 55.

[83] *See also Ameron, Inc. v. United States Army Corps of Engineers*, 607 F. Supp. 962, 972 (D.N.J. 1985), *appeal pending* (upholding the capacity of the Comptroller General to perform administrative functions under the Competition in Contracting Act because he is appointed by the President under a statutory scheme "substantially similar to that challenged in *Humphrey's Executor*"); *accord Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985).

[84] 458 U.S. 50 (1982) (plurality opinion), *discussed in* Opinion at 29-34, J.A. 56-61.

[85] 458 U.S. at 60-61; *compare* U.S. Const. art. III, § 1. Since Congress had left "no doubt" about the non-Article III status of

gized the 1921 removal provision to the 14-year term of the bankruptcy judge, which creates the possibility of nonrenewal. Both, it said, generate a desire to please the reappointing or removing authority and an impermissible "here-and-now subservience to another branch." [86] That theory proves far too much. Under that view, every independent officer serving a term of years who is subject to Senate confirmation of his reappointment would have to be viewed as subservient to the legislative branch.[87] *Northern Pipeline* does not establish such an extreme proposition, because it is based on the special constitutional status of Article III judges, whose tenure "during good Behaviour" [88] is facially inconsistent with a 14-year term.

To the extent that *Northern Pipeline* is relevant here, it tends to refute the district court's reasoning. The statute there made the judges subject to removal for cause by a judicial council composed of Article III judges. On the district court's theory, such a removal provision for these Article I judges created an impermissible "subservience" to the Article III judiciary, and presumably would have rendered the judges incapable of exercising even Article I functions. But the Court reached no such conclusion. It treated those judges as officers of the United States fully capable of performing functions that did not require the status of a judge with Article III tenure "during good Behaviour."

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the judges, the issue in this Court was not their status but whether particular functions could be delegated to them in light of their non-Article III status. 458 U.S. at 61.

[86] Opinion at 30, J.A. 57.

[87] Indeed, since consent to reappointment can be denied by a majority vote of the Senate alone, for unspecified reasons, such officers might be considered *more* subservient than the Comptroller General, who is removable only for cause by joint resolution and who cannot succeed himself.

[88] U.S. Const. art. III, § 1.

3. *Neither the President nor Congress has exercised a statutory power to remove an independent officer for cause.*

The "subservience" that was "presumed" by the district court[89] is not substantiated by experience under statutes making independent officers removable only for cause. To the contrary, our research has disclosed no instance since the creation of the Interstate Commerce Commission in 1887 in which the President or Congress has removed a member of an independent agency for statutorily prescribed cause.[90] *Humphrey's Executor* and *Wiener*, of course, involved attempted removals at the *pleasure* of the President, which were ruled unlawful under the statutory protections (express and implied, respectively) that were applicable. This history tends to show that statutes allowing removal only for cause do in fact make independent officers "free from 'political domination or control' " by the removing authority.[91]

The history of the 1921 Act confirms that it has succeeded in making the Comptroller General independent rather than subservient. In the 65 years since that statute became law, neither Congress nor the President has ever tried to remove a Comptroller General. And we know of no claim that any decision of the Comptroller General was ever improperly influenced by Congress or by the President. There are, in fact, many instances in

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[89] Opinion at 30, J.A. 57.

[90] There have been instances of independent officers who have resigned following disclosure of conduct reflecting on their integrity that might have provided cause for removal. However, we have found no case in which an officer who did not resign was removed for cause.

Justice Brandeis' dissent in *Myers* lists some early removals that were said by the President to be "for cause." 272 U.S. at 259-60 n.28. However, those removals were under statutes that did not restrict removal (as distinguished from suspension during a senatorial recess) to cause. *See id.*; Act of March 2, 1867, ch. 154, 14 Stat. 430; Act of July 12, 1876, ch. 179, 19 Stat. 80, 81.

[91] *Humphrey's Executor*, 295 U.S. at 625.

which the Comptroller General has taken positions contrary to those suggested by Members or committees of Congress or by officers of the Executive Branch.[92] No factual basis exists for believing that the removal provision has made the Comptroller General subservient to Congress.

The district court's ruling, and the erroneous presumption of subservience on which it is based, reflect an unduly rigid view of the separation of powers that seeks to prevent any intermixture of the branches of government.[93] The Founding Fathers did not view the separation of powers so mechanically. In defending the proposed Constitution against the charge that some of its provisions violated Montesquieu's famous maxim, which is quoted by the district court,[94] Madison argued that the maxim "has been totally misconceived and applied." [95] According to Madison, Montesquieu

> "did not mean that the departments [of government] ought to have no *partial agency* in, or no *control* over, the acts of each other. His meaning . . . can amount to no more than this, that where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." [96]

Madison thus recognized, as has this Court, that "a hermetic sealing off of the three branches of Government

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[92] *See, e.g.*, 64 Comp. Gen. 22 (1984) (allocation of Health and Human Services funds); 61 Comp. Gen. 520, 521 (1982) (Panama Canal); 61 Comp. Gen. 482, 485, 489 (1982) (termination of fossil energy research and development efforts); 53 Comp. Gen. 600 (1974) (provision of Secret Service protection to former executive official).

[93] *See* Opinion at 40-41, 46, 49-50, J.A. 68-70, 75, 78-80.

[94] *Id.* at 46, J.A. 75.

[95] *The Federalist* No. 47, at 337 (B.F. Wright ed. 1961).

[96] *Id.* at 338 (emphasis in original).

from one another would preclude the establishment of a Nation capable of governing itself effectively." [97] As Professor Paul M. Bator has observed:

> "[I]t was, precisely, the intention of the Framers that [the separation-of-powers] provisions be understood as setting out very general guidelines rather than as defining a rigid table of organization. Indeed, if we look at the Constitution as a whole, we see that its fundamental genius, its most pervasive institutional tactic, is not separation of powers at all, but, rather, checks and balances—a mixing of functions rather than a rigid separation among them." [98]

III. IF THE 1921 REMOVAL PROVISION IS RULED INCOMPATIBLE WITH THE COMPTROLLER GENERAL'S PERFORMANCE OF ADMINISTRATIVE FUNCTIONS, IT SHOULD BE HELD INVALID AND SEVERED FROM THE BALANCE OF THE 1921 ACT AND THEREFORE DISREGARDED IN DETERMINING THE CONSTITUTIONALITY OF THE 1985 ACT.

As we have shown, any incompatibility between the 1921 removal provision and the 1985 delegation of administrative functions existed equally within the 1921 Act itself. Congress in 1921 made clear how it intended any such incompatibility to be resolved: by severing the removal provision and preserving the balance of the 1921 Act. Any invalidity in the removal provision therefore should have no effect on the constitutionality of the

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[97] *Buckley v. Valeo*, 424 U.S. at 121; *see also* L. Jaffe, *Judicial Control of Administrative Action* 28-29, 32-33 (1965).

[98] P. Bator, *The Constitution and the Art of Practical Government* 15-16, Address to Law Club (Chicago, Ill. Feb. 5, 1986); *see The Federalist* No. 48, *supra*, at 343 (J. Madison) (the departments must be "so far connected and blended as to give to each a constitutional control over the others"). The decision in *Humphrey's Executor* was thus based not in "political science preconceptions characteristic of its era," as the district court charged, Opinion at 40, J.A. 68, but in constitutional "preconceptions" dating back to the founding of our nation.

trigger mechanism in the 1985 Act, particularly since Congress in 1985 did not rely on the existence of the 1921 removal provision.

A. Congress Would Have Intended the Balance of the 1921 Act to Survive If the Removal Provision Were Found to Be Incompatible with the Comptroller General's Performance of His Administrative Functions Under that Act.

In 1921, as we have noted, the scope of the President's removal power and the right of Congress to share in the removal process were still largely undefined by this Court. When the proponents of the 1921 Act included the removal provision as a means of ensuring the Comptroller General's independence from the President, they were aware of the controversy surrounding that provision and they expected it would be severed if it were held unconstitutional. On the day the House received President Wilson's veto of the 1920 bill, the following colloquy occurred in the course of an unsuccessful attempt to override:

> "Mr. PELL. If we pass this over the President's veto and then the Supreme Court should uphold the contention of the President, this bill would not fail, would it? The bill would continue.
>
> "Mr. BLANTON. Certainly.
>
> "Mr. PELL. The failure of this one clause would not destroy the whole thing?
>
> "Mr. GOOD. I have not given that any consideration. I think it is very remote." [99]

Representative Good also stated that, "if the statute is unconstitutional or any provision of the statute is unconstitutional, then *to that extent* the statute must necessarily fall." [100]

Moreover, Representative Good, a staunch proponent of the concurrent and joint resolution procedures, made clear

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[99] 59 Cong. Rec. 8611 (1920).

[100] *Id.* at 8610 (emphasis added).

that he was willing to sacrifice those procedures in order to enact the remainder of the bill. The day following the veto, the House at his urging passed a bill identical to the vetoed one except that the tenure provision said simply that the Comptroller General would hold office during good behavior.[101] In passing the bill, the House recognized that the "good behavior" limitation might not prevent the President from removing the Comptroller General for cause, and perhaps even at will.[102]

This history leaves no doubt that Congress intended the removal provision to be severable from the remainder of the 1921 Act. It chose the joint resolution procedure as a way to protect against removal by the President at will. At the same time, the bill's proponents made clear that if the removal provision were held invalid, they wanted the rest of the Act to survive.

The rest of the Act made the GAO and the Comptroller General independent of the Executive Branch and gave the Comptroller General a 15-year nonrenewable term.

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[101] H.R. 14,441, 66th Cong., 2d Sess., 59 Cong. Rec. 8647, 8656 (1920). The new bill as first introduced provided for appointment and removal by the Supreme Court. *Id.* at 8648. This proved controversial (for reasons unrelated to any desire to retain the power in Congress), and Rep. Good amended the language to that described above. *Id.* at 8656.

[102] *Id.* at 8657 (Reps. Mondell and Blanton), 8652 (Rep. Good). The new bill was promptly introduced in the Senate, *id.* at 8625, but no vote was taken before the second session of the 66th Congress ended that day. In the discussion that did occur, a number of Senators advocated passage, while maintaining that the removal provision in the vetoed bill was constitutional. *Id.* at 8626 (Sens. Kenyon and Borah). During the short third session, the new bill was raised but was passed over because of the absence of Senators who had expressed the wish to be present for the bill's consideration. 60 Cong. Rec. 2001 (1921). The Senate, however, had previously shown its willingness to forego a congressional role in removal: In the early consideration of the original bill, the Senate amended the House version to remove the concurrent resolution procedure and to provide simply for removal "for cause." *See* H.R. 9783, [illegible]21, 66th Cong., 2d Sess., 59 Cong. Rec. 6279 (1920); 59 Cong. Rec. 6280 (1920) (amendment accepted by Senate).

Even though severance of the removal provision would leave the 1921 Act silent on the removal question, there can be no doubt the 1921 Congress would have preferred this to the *status quo* of a Comptroller of the Treasury controlled by the President and removable by him at will. Accordingly, severance of the removal provision would do no violence to what Congress intended in 1921. And that is most particularly true today since the Comptroller General would now be protected by the principle of *Wiener*, and would not be removable by the President at will.[103]

B. Under this Court's Severability Decisions, the Removal Provision Is Severable from the Balance of the 1921 Act.

This Court's severability precedents establish that the invalidity of part of a law will not affect the validity of the remainder (1) if the valid provisions are capable of standing alone, and (2) if the legislature would have intended the valid provisions to stand absent the invalid provisions.[104] When these conditions are met, "[t]he offending provision—whether section, sentence, phrase or individual word—can be excised" to preserve the balance of the statute.[105]

Recent decisions have made clear that the presumption is in favor of severability. In *Buckley v. Valeo*, the Court stated the rule as follows:

> "Unless it is *evident* that the Legislature would not have enacted those provisions which are within its power, independently of that which is not, the in-

[103] *Wiener* confirmed that an independent officer is impliedly protected from discretionary removal even when the organic statute is silent on the question. *See supra* pp. 28-29.

[104] *See* Stern, *Separability and Separability Clauses in the Supreme Court*, 51 Harv. L. Rev. 76 (1937).

[105] *Id.* at 106.

valid part may be dropped if what is left is fully operative as a law." [106]

Similarly, in *Regan v. Time, Inc.*, the Court, while acknowledging that severability is primarily a question of legislative intent, underscored that "the presumption is in favor of severability." [107]

Both parts of the severability test are satisfied here. First, the remainder of the 1921 Act is fully capable of standing alone if the removal provision is excised. That provision's presence or absence has no effect whatever on the portion of the 1921 Act establishing the office of the Comptroller General; likewise, it has no effect on the other portions of the 1921 Act establishing the Bureau of the Budget (now OMB) and the executive budget process.

Second, as we have shown, Congress intended the remainder of the 1921 Act to stand if the removal provision were ruled unconstitutional. Even if the legislative intent were less clear on this point, any uncertainty would require severance rather than invalidation of the entire 1921 Act. To reach a conclusion of nonseverability, the Court would have to find it "evident" that Congress would not have enacted the remainder of the 1921 Act without the removal provision. The purpose and history of the statute preclude such a finding. If the Court concludes that the removal provision of the 1921 Act is unconstitutional, it should sever that provision and preserve the remainder of the statute.

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[106] 424 U.S. at 108 (emphasis added) (quoting *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210, 234 (1932)); *accord INS v. Chadha*, 462 U.S. 919, 931-35 (1983).

[107] 104 S. Ct. 3262, 3269 (1984) (plurality opinion). The Court reasoned that, because a ruling of unconstitutionality "frustrates the intent of the elected representatives of the people," the Court should act with restraint and "refrain from invalidating more of the statute than is necessary." 104 S. Ct. at 3269.

C. Severance of the 1921 Removal Provision Would Eliminate Any Obstacle to the Comptroller General's Performance of His Administrative Functions Under the 1985 Act.

1. *Congress in 1985 chose the Comptroller General because he is an independent officer of the United States, not because of a belief that he is subservient to Congress.*

The district court was "doubtful" that Congress in 1985 would have delegated the functions it did to the Comptroller General "if the Comptroller General were not removable by Congress." [108] It cited no legislative history to support that "presumed congressional intent," but simply mentioned that Congress chose the Comptroller General over the Director of OMB because of the latter's "pro-executive bias." [109] The court's non sequitur is obvious: The fact that Congress chose the Comptroller General because he is independent of the Executive does not mean that it chose him because he is subservient to Congress. And the legislative history of the 1985 Act refutes the court's unwarranted presumption: Just as Congress in 1921 intended the Comptroller General to be independent of both political branches, it chose him in 1985 for his factfinding role because he has proven to be independent of both political branches throughout the 65-year history of the office.

The selection of the Comptroller General to perform the reporting function that is the heart of the 1985 Act was a compromise designed to resolve objections raised by each House to the approach initially taken by the other. In the Senate, the bill as introduced and passed delegated the factfinding responsibilities to the Directors of OMB and CBO, acting jointly.[110] If the Directors

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[108] Opinion at 33, J.A. 60.

[109] *Id.*

[110] 131 Cong. Rec. S12,562, S12,564 (daily ed. Oct. 3, 1985). The proposal was introduced by Senators Gramm, Rudman, and Hollings on the Senate floor as an amendment to a House bill to increase the federal debt ceiling. *Id.* at S12,561-62.

failed to agree, they were to average their differing findings. The House countered by passing a bill that entrusted the factual determinations to the Director of CBO, acting "in consultation with" the Director of OMB.[111]

Opponents of the Senate version charged that the role it gave to OMB amounted to an unconstitutional transfer of legislative power to the President.[112] On a practical level, opponents also argued (and some supporters acknowledged) that OMB operated as "a truly partisan arm of the President" [113] and was likely to use its power under the Act to try to achieve whatever result the President desired.[114]

At the same time, opponents of both the Senate and House approaches saw constitutional problems in the roles each gave to CBO. Although they viewed CBO as nonpartisan,[115] they believed that its Director could be given only an advisory role, because he is appointed by Congress and is not a duly appointed officer of the United States.[116]

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[111] 131 Cong. Rec. H9577, H9590-92 (daily ed. Nov. 1, 1985).

[112] *E.g.*, 131 Cong. Rec. H9606-09 (daily ed. Nov. 1, 1985) (remarks of Rep. Rodino; Letter from Rep. Rodino to Rep. Rostenkowski; Letter from Prof. Laurence H. Tribe, Harvard University Law School, to Rep. Mike Synar); *id.* at S12,630-31 (Oct. 4) (remarks of Sen. Johnston); *id.* at S12,708 (Oct. 5) (remarks of Sen. Hart); *see also id.* at S12,670 (Oct. 4) (remarks of Sen. Rudman).

[113] 131 Cong. Rec. S12,754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn); *accord id.* at S12,701 (Oct. 5) (remarks of Sen. Hart); *id.* (remarks of Sen. Rudman); *id.* at S12,753 (Oct. 6) (remarks of Sen. Chiles); *id.* at S12,897 (Oct. 8) (remarks of Sen. Chiles).

[114] *E.g.*, *id.* at S12,754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn); *id.* at S12,978 (Oct. 9) (House Democratic Study Group analysis, submitted by Sen. Riegle); *id.* at S13,113 (Oct. 10) (remarks of Sen. Byrd).

[115] *E.g.*, 131 Cong. Rec. S12,754 (daily ed. Oct. 6, 1985) (remarks of Sen. Glenn); *id.* at S12,907 (Oct. 8) (remarks of Sen. Chiles); *id.* at S12,978 (Oct. 9) (House Democratic Study Group analysis).

[116] *E.g.*, 131 Cong. Rec. H9608-09 (daily ed. Nov. 1, 1985) (Letter from Prof. Laurence H. Tribe, Harvard University Law School, to

To resolve all of these concerns, a substitute was proposed by the Senate and adopted by both Houses, delegating the factfinding functions to the Comptroller General, with advice from OMB and CBO.[117] Congress viewed the Comptroller General's qualifications for the job to be his status as an "executive" officer[118] constitutionally capable of performing administrative functions that CBO could not, his independence from both political branches, and his reputation for fairness and impartiality deriving from that independence.[119] Our research discloses no reference to the 1921 removal provision, and no

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Rep. Mike Synar, submitted by Rep. Rodino); *see e.g.*, *id.* at S14,658 (remarks of Sen. Packwood); *id.* at S14,661 (remarks of Sen. Gramm); *id.* at H9866 (Nov. 6) (remarks of Rep. Lott).

[117] The new mechanism was first introduced in the Senate as part of a package of amendments sponsored by Senators Packwood and Domenici. 131 Cong. Rec. S14,745, S14,748-49 (daily ed. Nov. 4, 1985); *see id.* at S14,658-59 (Nov. 1) (remarks of Sen. Packwood). It was ultimately adopted by the Senate and House conferees and then passed by both Houses. H.R. Rep. No. 433, 99th Cong., 1st Sess. 72-84 (1985) ("Conf. Report"), *reprinted in* 1985 U.S. Code Cong. & Ad. News 988; 131 Cong. Rec. H11,903-04 (daily ed. Dec. 11, 1985) (House passage); *id.* at S17,443-44 (Senate passage).

[118] *See* 131 Cong. Rec. S14,659 (daily ed. Nov. 1, 1985) (Sen. Packwood) (GAO is an "executive agency"); *id.* at S14,666 (Sen. Hollings) (GAO "is an executive body. It can make orders."); *cf.* 5 U.S.C. §§ 104-105 (1982) (GAO is an "Executive agency").

[119] *See* 131 Cong. Rec. H9864 (daily ed. Nov. 6, 1985) (Rep. Cheney) ("We have wrestled with the constitutional questions. We have included GAO. I am personally convinced, based upon the work that the American Law Division has done at the Library of Congress, that this is indeed a constitutional package."); *id.* at H11,894 (Dec. 11) (Rep. Weiss) (conceding, as opponent of the bill, that having the Comptroller General "acting as an arbiter" between OMB and CBO will make it "more difficult for the administration to manipulate its estimates of deficit figures for political reasons"); *id.* at E5622 (Rep. Bedell) ("[T]he compromise version greatly reduces the opportunity for political manipulation of the automatic cut process, and ensures that such cuts would be fairly made. . . . The General Accounting Office is a nonpartisan office whose director is appointed for a 15-year term, and is responsible to both the President and Congress.").

suggestion that the Comptroller General would favor CBO over OMB if they disagreed over deficit projections.

The district court found that the inclusion in the 1985 Act of a fallback deficit reduction mechanism "strongly suggested" a "congressional intent that it is the Comptroller General's powers under this Act, rather than his manner of removal, that should yield if both cannot coexist." [120] That inference is unwarranted. Congress included the fallback mechanism, under which the deficit reduction process would be returned to Congress for a joint resolution if the primary mechanism were held invalid,[121] in response to the constitutional objections that had been raised during its deliberations.[122] Those objections related primarily to the role of the CBO and the asserted overbreadth of the delegation. The congressional debates do not indicate that, overbreadth aside, any objection was raised to the Comptroller General's constitutional capacity to perform his duties under the Act. The Members' explanations of why the fallback was included make no reference to the Comptroller General's status. Indeed, nowhere in the published deliberations did anyone dispute the characterizations of the Comptroller General as an "executive" officer whose role would avoid the constitutional issues attending CBO's performance of the factfinding function. Although the President's signing statement objects to the Comptroller General's role, even it does not mention the 1921 removal provision as the basis of any constitutional concerns about the Act. Moreover, his principal objection, that the Comptroller General is an agent or officer of Congress, was not mentioned in the legislative history and was not adopted by the district court.

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[120] Opinion at 33, J.A. 60.

[121] Act § 274(f), J.A. 165.

[122] *See* 131 Cong. Rec. S14,658-59 (daily ed. Nov. 1, 1985) (remarks of Sen. Packwood); *id.* at H9867 (Nov. 6) (remarks of Rep. Lott); Conf. Report at 100 (fallback was included "as a 'Fail Safe' mechanism against a successful contrary claim upsetting the balanced provisions of the Act").

The fallback mechanism thus reflects a congressional intent to save at least the deficit reduction goals of the Act even if the trigger mechanism were held to involve excessive delegation of legislative power or if the CBO were ruled incapable of performing even its advisory role. There is nothing to suggest that it reflects an effort to preserve the never-mentioned removal provision of the 1921 Act.

2. *The functions delegated to the Comptroller General by the 1985 Act are qualitatively no more "executive powers" than those delegated to independent officers by the 1921 Act and many other statutes.*

The opinion below suggests—but does not hold—that the functions assigned to the Comptroller General by the 1985 Act cannot be delegated to an independent officer, even one removable only by the President for cause.[123] The district court characterized the Comptroller General's functions under the 1985 Act as "executive powers," and distinguished them in this respect from the functions this Court has held may be delegated to independent officers in *Humphrey's Executor* and subsequent cases.[124] It is not clear what the district court meant by the term "executive powers." [125] In any event, this Court's

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[123] Opinion at 33, 38 n.25, 42-47, J.A. 60, 66, 70-76.

[124] *Id.* at 38 n.25, 44, J.A. 66, 73.

[125] The court said it was using the term "executive powers" to mean "executive power in the constitutional sense," as this Court used that expression in *Humphrey's Executor*. Opinion at 38 n.25 (quoting 295 U.S. at 628 & n.*). However, this Court appears to have used the latter expression to refer to powers that are so inherently executive that they may be performed only by "purely executive officers" who are subject to removal at the pleasure of the President. This Court distinguished such powers from the "executive function[s]" that it held the Federal Trade Commission could perform as an independent agency. 295 U.S. at 628. The district court here expressly declined to rule that the functions assigned to the Comptroller General by the 1985 Act may be performed only by "purely executive officers" removable at the pleasure

previous decisions have upheld the performance by independent officers of functions more "executive" from a constitutional standpoint than those at issue here.

Among the provisions of the Federal Trade Commission Act considered by this Court in *Humphrey's Executor* was Section 5, which declared illegal "unfair methods of competition in commerce" and "empowered and directed" the Commission "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in commerce." [126] As the Court noted, the Commission had enforcement authority with respect to such violations, including the power to issue cease and desist orders and to resort to the courts.[127] Such civil enforcement functions are executive functions that may be performed only by officers of the United States, as this Court later held in *Buckley v. Valeo*.[128] Yet this Court in *Humphrey's Executor* upheld the constitutionality of assigning such authority to independent Commissioners removable by the President only for cause.

The Comptroller General's factfinding functions under the 1985 Act are less "executive" than those enforcement functions. They are factfinding functions of a type that are commonly delegated to independent agencies.

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of the President. Opinion at 33, J.A. 60. Indeed, the court noted that the factfinding functions assigned to the Comptroller General are far more circumscribed than functions assigned to other independent agencies. The Comptroller General "is not made responsible for a single *policy* judgment." Opinion at 24-25, J.A. 51 (emphasis in original).

[126] Federal Trade Commission Act, Pub. L. No. 63-203, § 5, 38 Stat. 717, 719 (1914) (current version at 15 U.S.C. § 45 (1982)), *quoted in* 295 U.S. at 620.

[127] 295 U.S. at 620-21; *see* Federal Trade Commission Act, *supra*, § 5. The Commission also had power to enforce Sections 2, 3, 7, and 8 of the Clayton Act. Pub. L. No. 63-212, § 11, 38 Stat. 730, 734 (1914) (current version at 15 U.S.C. § 21 (1982)); *see United States v. Philadelphia National Bank*, 374 U.S. 321, 339 & n.17, 346-48 (1963).

[128] 424 U.S. at 138-41.

In order to project the size of the budget deficit, the Comptroller General must make predictive findings of fact—involving less discretion than the judgments made by other independent officers, such as the members of the International Trade Commission in finding import injury to domestic industries.[129] In order to calculate the reductions necessary in particular accounts, he must apply detailed statutory directions to the complex federal accounting structure—a function not unlike the auditing, account settlement, and certification functions he has long performed.

The court below recognized that these "administrative decisionmaking" functions are similar to "many others committed to the charge of administrative officials." [130] The court specifically likened the Comptroller General's forecasting responsibility to "the complex economic calculations required of the agenc[y] that determine[s] the discount rate" [131]—that is, the independent officers appointed to the Board of Governors of the Federal Reserve System.[132] In fact, the court noted that the responsibilities of the Comptroller General under the 1985 Act are narrower than those of many administrative agencies, since "the *only* discretion conferred is the ascertainment of facts and the prediction of facts." [133] The Comptroller General "is not made responsible for a single *policy* judgment." [134]

The district court deemed the Comptroller General's factfinding functions to be peculiarly "executive" because the President is bound by the Comptroller General's findings in issuing his sequestration order.[135] However, it is

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[129] *See* 19 U.S.C.A. §§ 1671b, 1671d, 1673b, 1673d (1982 & West Supp. 1985).

[130] Opinion at 24, J.A. 50-51.

[131] *Id.*

[132] *See* Federal Reserve Act § 12A, 12 U.S.C. § 263 (1982).

[133] Opinion at 24-25, J.A. 51 (emphasis in original).

[134] *Id.* at 25, J.A. 51 (emphasis in original).

[135] *Id.* at 44, J.A. 73.

commonplace for Congress to delegate factfinding responsibilities to independent agencies and to give the agencies' determinations the effect of law, binding both on the executive departments and on private individuals. This Court in *Wiener* was not troubled by the fact that the statute before it made the findings of the War Claims Commission binding on the Secretary of the Treasury, who was required to pay awards rendered by the Commission.[136] Similarly, the administrative determinations of the Federal Election Commission necessarily bind the President, who (when he seeks reelection) is one of the candidates whose campaign activities the Commission regulates. Yet this Court in *Buckley* made clear that independent officers appointed for a term of years under the Appointments Clause could perform the functions delegated by the Federal Election Campaign Act.[137] Further, as noted above, many of the Comptroller General's determinations under the 1921 Act are expressly made binding on the executive departments.[138] Many other examples could be given;[139] these suffice to

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[136] The War Claims Commission was established to determine claimants' entitlements to a "War Claims Fund in the hands of the Secretary of the Treasury." The Secretary was to pay out of the Fund awards rendered by the Commission, which were "not subject to review by any other official of the United States or by any court by mandamus or otherwise." 357 U.S. at 354-55.

[137] *See* 424 U.S. at 137-41. The Court mentioned the Comptroller General as such an officer, noting that he had performed administrative functions under an earlier version of the election statute. *Id.* at 128 n.165. After *Buckley*, Congress reenacted the statute, delegating the same functions to a Commission whose voting members are all appointed under the Appointments Clause. Federal Election Campaign Act Amendments of 1976, Pub. L. No. 94-283, 90 Stat. 475.

[138] *See supra* p. 19; App. A.

[139] *E.g.*, 19 U.S.C.A. §§ 1671b, 1671d, 1673b, 1673d (1982 & West Supp. 1985) (in antidumping and countervailing-duty proceedings, the International Trade Commission's injury determinations are conclusive on the Department of Commerce); 19 U.S.C.A. §§ 2251-52 (1982 & West Supp. 1985) (under "escape clause" provision, ITC's finding of injury or threat of injury due to excessive imports

illustrate that the very reason for establishing an independent officer of the United States would generally be frustrated if such an officer were incapable of making decisions that bind the executive departments.

It is therefore clear that the functions assigned to the Comptroller General by the 1985 Act may be delegated to an independent officer protected against removal "at the mere will of the President." [140] Whether the 1921 removal provision is upheld as not creating an impermissible "subservience" to another branch, or whether it is ruled unconstitutional and severed from the balance of the 1921 Act, there is no constitutional impediment to the Comptroller General's performance of the factfinding functions assigned to him by the 1985 Act.

There may well be "executive powers" that can be assigned only to officers removable at the pleasure of the President, such as the conduct of foreign policy that was the focus of the congressional decision of 1789. However, no bright and immutable constitutional line can be drawn to encircle such powers—indeed, the postmasters who were so "purely executive" in *Myers* only 60 years ago are no longer appointed or removable by the President. They now serve in the United States Postal Service, an "independent establishment of the executive branch." [141] The President appoints and the Senate confirms only its Governors, who serve statutory terms of nine years and are removable by the President only for cause.[142] And it is clear that the territory with-

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is conclusive, and the President must order import relief unless he finds that relief would be contrary to the national economic interest); 28 U.S.C. §§ 171, 173 (1982) (U.S. Claims Court—an Article I court, the judges of which are removable by the U.S. Court of Appeals for the Federal Circuit—may render judgments against executive departments, grant equitable relief, and order the payment of damages).

[140] *Humphrey's Executor*, 295 U.S. at 626.

[141] 39 U.S.C. § 201 (1982).

[142] 39 U.S.C. § 202 (1982 & Supp. I 1983). The Postal Rate Commission is likewise "independent," and its Commissioners are also removable only for cause. 39 U.S.C. § 3601 (1982).

in that "purely executive" circle excludes many functions —like civil enforcement tasks—typically thought of as "executive." [143] Whatever such "purely executive powers" may be, the factfinding functions assigned to the Comptroller General by the 1985 Act are not among them.

IV. IF THE 1921 REMOVAL PROVISION IS HELD UNCONSTITUTIONAL *PER SE* AS DENYING THE PRESIDENT THE SOLE POWER TO REMOVE HIS APPOINTEE FOR CAUSE, IT SHOULD BE SEVERED FROM THE BALANCE OF THE 1921 ACT AND DISREGARDED IN DETERMINING THE CONSTITUTIONALITY OF THE 1985 ACT.

As noted above, President Wilson asserted in his 1920 veto message that the President can insist on the power to remove any non-Article III officer of the United States he has appointed and that Congress may not share in this power.[144] He advanced that view without reference to the issue of subservience to another branch; indeed, he construed Article II as *per se* requiring the total subservience of all such officers to the President. The majority of this Court adopted that view in *Myers*, six years after Wilson's veto.[145] The Solicitor General argued in *Myers* that the 1921 Act creating the office of Comptroller General was a prime example of the mischief that could result if the President was denied the sole power to remove an officer he appoints.[146] The majority opinion twice referred with approval to President Wilson's veto message, and quoted his position that the President's power to appoint an officer of the United

[143] *See, e.g., Buckley v. Valeo*, 424 U.S. at 138-40; *Humphrey's Executor*, 295 U.S. at 620-21, 628-29, 631-32.

[144] *See supra* p. 23; App. B at 3b-4b.

[145] The majority opinion asserts that a presidential right to remove at will extends to officers performing judicial as well as administrative functions. 272 U.S. at 135.

[146] Substitute Brief for the United States on Reargument 94-101 (Apr. 13, 1925), *Myers*.

States carries with it the sole power of removal.[147] Justices McReynolds and Brandeis, in separate dissents joined by Justice Holmes, interpreted the majority opinion as meaning that the removal provision in the 1921 Act was unconstitutional.[148]

Nine years later, *Humphrey's Executor* limited the *Myers* ruling to "purely executive officers." [149] But *Humphrey's Executor* upheld a statute granting the President the sole right to remove Federal Trade Commissioners for cause, not a statute (as in *Myers*) reserving a role for Congress in the removal process. Since *Myers*, this Court has never had occasion to rule whether Congress may constitutionally play a role (other than impeachment) in the removal of an officer of the United States. In *Buckley v. Valeo*, involving the delegation of administrative functions to an independent Commission, the Court said that "the President may not insist that such functions be delegated to an appointee of his removable *at will*," [150] perhaps implying that the President may insist on the sole constitutional right to dismiss such an appointee *for cause*.

If the Court should now decide that this is the case, the 1921 removal provision would have to be held invalid on its face and severable under this Court's precedents on severability. In that event, it would have no bearing on the constitutionality of the 1985 Act.

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[147] 272 U.S. at 169, 172.

[148] *Id.* at 181-82 (McReynolds, J.); *see id.* at 263-64 (Brandeis, J.).

[149] 295 U.S. at 627-28.

[150] 424 U.S. at 141 (emphasis added) (citing *Humphrey's Executor*).

CONCLUSION

The decision of the district court should be reversed insofar as it held unconstitutional that portion of the 1985 Act delegating functions to the Comptroller General.

Respectfully submitted,

HARRY R. VAN CLEVE
General Counsel

JAMES F. HINCHMAN
Deputy General Counsel

ROBERT P. MURPHY
Attorney-Adviser

U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548
Tel. (202) 275-5207

LLOYD N. CUTLER *
JOHN H. PICKERING
WILLIAM T. LAKE
RICHARD K. LAHNE
NEAL T. KILMINSTER

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for the Comptroller General of the United States

* Counsel of Record

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APPENDIX A

STATUTORY ANTECEDENTS TO THE COMPTROLLER GENERAL'S FUNCTIONS UNDER THE 1921 ACT

The first Congress in 1789 enacted a law creating the Treasury Department and establishing its top officers, including the Secretary, the Comptroller of the Treasury, the Auditor, and the Register.[1] That statute detailed a variety of duties of the Comptroller:

> "[I]t shall be the duty of the Comptroller to superintend the adjustment and preservation of the public accounts; to examine all accounts settled by the Auditor, and certify the balances arising thereon to the Register; to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law; to report to the Secretary the official forms of all papers to be issued in the different offices for collecting the public revenue, and the manner and form of keeping and stating the accounts of the several persons employed therein. He shall moreover provide for the regular and punctual payment of all monies which may be collected, and shall *direct prosecutions for all delinquencies of officers of the revenue; and for debts that are, or shall be due to the United States.*" [2]

The responsibility of the Comptroller of the Treasury to "direct prosecutions for all delinquencies of officers of the revenue; and for debts that are, or shall be due to the United States" was enhanced by the Act of March 3, 1795, which authorized him to commence suits for recovery of debts from accountable officers.[3] The Act of

[1] Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

[2] *Id.* § 3, 1 Stat. at 66 (emphasis added).

[3] Ch. 48, 1 Stat. 441.

March 3, 1797 went beyond this: It not only authorized but required the Comptroller to bring suit on such debts.[4]

The Treasury Department was reorganized by the Act of March 3, 1817.[5] That law added a second Comptroller of the Treasury and four more Auditors, centralizing in the Treasury Department certain account settlement and warrant countersignature functions that had been performed by the accountants in the War and Navy Departments. Section 2 of the 1817 Act provided that

> "all claims and demands whatever, by the United States or against them, and all accounts whatever in which the United States are concerned, either as debtors or as creditors, shall be settled and adjusted in the Treasury Department." [6]

The Comptroller General's present authority to settle accounts and claims is a direct descendant of that provision.[7] The tasks of the First Comptroller of the Treasury included the duty

> "to examine all accounts settled by the first and fifth auditors, and certify the balances arising thereon to the register; to countersign all warrants drawn by the Secretary of the Treasury, which shall be warranted by law; to report to the secretary the official forms to be issued in the different offices for collecting the public revenue, and the manner and form of keeping and stating the accounts of the

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[4] Ch. 20, 1 Stat. 512.

[5] Ch. 45, 3 Stat. 366.

[6] *Id. Compare* 31 U.S.C. §§ 3526(a), 3702(a) (1982).

[7] *See* 31 U.S.C. § 3526(a) (1982) ("The Comptroller General shall settle all accounts of the United States Government and supervise the recovery of all debts finally certified by the Comptroller General as due the Government."); *id.* § 3526(d) ("On settling an account of the Government, the balance certified by the Comptroller General *is conclusive on the executive branch* of the Government.") (emphasis added).

several persons employed therein; [and to] superintend the preservation of the public accounts, subject to his revision, and provide for the regular payment of all moneys which may be collected." [8]

The 1817 Act also carried forward the First Comptroller's enforcement duties with respect to collection of debts:

"[I]t shall be the duty of the first comptroller to superintend the recovery of all debts to the United States; to direct suits and legal proceedings, and take all such measures as may be authorized by the laws, to enforce prompt payment of all debts to the United States." [9]

The pattern of fiscal administration established by the 1817 Act persisted through most of the nineteenth century.[10] The pattern was again altered by the Dockery Act of 1894.[11] That law abolished the Second Comptroller. reinvesting his duties in the First Comptroller, in a reversion to the scheme of the 1789 Act. The Auditors continued to examine and certify balances, to settle accounts, and to superintend, under the direction of the Comptroller, the recovery of debts due the United

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[8] Act of March 3, 1817, § 8, 3 Stat. at 367. Section 9 set out the duties of the Second Comptroller; these included examination of accounts settled by the second, third, and fourth Auditors, and countersignature of Treasury warrants signed by the Secretaries of War and the Navy.

[9] *Id.* § 10, 3 Stat. at 368. This debt collection responsibility has been superseded recently by a more comprehensive debt collection law, under which the Comptroller General and the Attorney General jointly prescribe claims collection standards. 31 U.S.C.A. §§ 3711-3719 (West Supp. 1985).

[10] The Act of March 30, 1868, amended the 1817 Act to state that the balances certified by the Comptroller of the Treasury were "final and conclusive" on the heads of the departments. Ch. 36, 15 Stat. 54. This provision, as rephrased, remains in effect with respect to the Comptroller General. *See* 31 U.S.C. § 3526(d) (1982).

[11] Ch. 174, §§ 3-4, 28 Stat. 162, 205-06.

States. Balances certified by the Auditors, or by the Comptroller on appeal from their decisions, were made "final and conclusive" on the "Executive Branch." [12] The Dockery Act authorized the Comptroller to render advance decisions on questions of payment when requested by disbursing officers and department heads, also an antecedent of an existing GAO responsibility.[13] It required the Comptroller to countersign all Treasury warrants, an authority now vested in the Comptroller General.[14] And it required the Comptroller to "prescribe the forms of keeping and rendering all public accounts" (except those of the Post Office), a function now performed by the Comptroller General.[15]

The Budget and Accounting Act of 1921 transferred these authorities to the new Comptroller General.[16]

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[12] *Id.* § 8, 28 Stat. at 207.

[13] *Id.* § 8, 28 Stat. at 208. *Compare* 31 U.S.C. § 3526 (1982).

[14] Dockery Act § 11, 28 Stat. at 209. *Compare* 31 U.S.C. § 3323 (1982).

[15] Dockery Act § 5, 28 Stat. at 206. *Compare* 31 U.S.C. § 3511 (1982).

[16] Ch. 18, § 304, 42 Stat. 20, 24 (1921).

APPENDIX B

RELEVANT LEGISLATIVE HISTORY MATERIALS FOR THE 1921 ACT

I. H.R. 9783—66th Congress

1. H.R. 9783 was introduced in the House of Representatives by Representative Good in 1919. 58 Cong. Rec. 6533 (1919).

2. As introduced, section 9 of H.R. 9783 provided in pertinent part:

> "That there is created a department to be known as the accounting department, which shall be an establishment of the Government independent of the executive departments and under the control and direction of the comptroller general of the United States. . . .
>
> "There shall be in the accounting department a comptroller general of the United States and an assistant comptroller general of the United States, who shall be appointed by the President, with the advice and consent of the Senate . . . . The comptroller general and the assistant comptroller general shall hold office during good behavior, but may be removed at any time by concurrent resolution of Congress after notice and hearing, when, in their judgment, the comptroller general or assistant comptroller general has been inefficient, or guilty of neglect of duty, or of malfeasance in office, and for no other cause and in no other manner."

58 Cong. Rec. 7231 (1919).

3. H.R. 9783 was amended on the floor to add to the enumerated causes for removal "any felony or conduct involving moral turpitude." 58 Cong. Rec. 7282-83 (1919). It was also amended to add impeachment as an alternative means of removal. *Id.* at 7281.

4. As amended, H.R. 9783 passed the House. 58 Cong. Rec. 7297 (1919).

5. The Senate amended H.R. 9783, striking out everything following the enacting clause and substituting its own text. 59 Cong. Rec. 6278-80 (1920). Section 21 of the Senate's substitute text read, in pertinent part:

> "That there is created an establishment to be known as the general accounting office, which shall be independent of the several executive departments and under the control and direction of the comptroller general of the United States. . . .
>
> "There shall be in the general accounting office a comptroller general of the United States and three assistant comptrollers general of the United States, who shall be nominated and, by and with the advice and consent of the Senate, appointed by the President. . . . The comptroller general and the assistant comptroller general shall hold office for a term of five years and shall be removable only for cause."

Id. at 6279. This version of H.R. 9783 passed the Senate. *Id.* at 6395.

6. The House and Senate conferees agreed that the new agency would be called the "general accounting office," and that there would be a single Comptroller General and a single Assistant Comptroller General. Conference Report on H.R. 9783, H. Rep. 1044, *reprinted in* 59 Cong. Rec. 7942, 7944 (1920). Section 303 of H.R. 9783, as agreed to by the conferees, provided in pertinent part:

> "The comptroller general and the assistant comptroller general shall hold office during good behavior, but may be removed at any time by concurrent resolution of Congress, after notice and hearing, when, in their judgment, the comptroller general or assistant comptroller general is incapacitated or inefficient,

> or has been guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment."

Id.

7. H.R. 9783, as agreed to by the conferees, passed the Senate on May 27, 1920. 59 Cong. Rec. 7722 (1920). It passed the House on May 29, 1920. *Id.* at 7956.

8. President Wilson vetoed H.R. 9783 on June 4, 1920. The text of his veto message is set out below:

> "I am returning without my signature H.R. 9783, 'An act to provide a national budget system, an independent audit of Government accounts, and for other purposes.' I do this with the greatest regret. I am in entire sympathy with the objects of this bill and would gladly approve it but for the fact that I regard one of the provisions contained in section 303 as unconstitutional. This is the provision to the effect that the comptroller general and the assistant comptroller general, who are to be appointed by the President with the advice and consent of the Senate, may be removed at any time by a concurrent resolution of Congress after notice and hearing, when, in their judgment, the comptroller general or assistant comptroller general is incapacitated or inefficient, or has been guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. The effect of this is to prevent the removal of these officers for any cause except either by impeachment or a concurrent resolution of Congress. It has, I think, always been the accepted construction of the Constitution that the power to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional

power to limit the appointing power and its incident, the power of removal derived from the Constitution.

"The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution to remove an officer appointed by the President with the advice and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred, and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negatived by section 2 of Article II. That section, after providing that certain enumerated officers and all officers whose appointments are not otherwise provided for shall be appointed by the President with the advice and consent of the Senate, provides that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of department. It would have been within the constitutional power of the Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department. Regarding as I do the power of removal from office as an essential incident to the appointing power, I can not escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill.

"I am returning the bill at the earliest possible moment with the hope that the Congress may find time before adjournment to remedy this defect."

59 Cong. Rec. 8609-10 (1920).

9. On the same day, a vote to override President Wilson's veto failed in the House. 59 Cong. Rec. 8613-14 (1920).

II. H.R. 14,441—66th Congress

1. On June 5, 1920, the final day of the second session of the 66th Congress, Representative Good introduced H.R. 14,441. 59 Cong. Rec. 8647 (1920). This bill attempted to meet President Wilson's objections by altering the removal provision. The new appointment and removal provisions as initially proposed by Representative Good provided:

> "Sec. 302. There shall be in the general accounting office a comptroller general of the United States and an assistant comptroller general of the United States, who shall be appointed by the Supreme Court of the United States . . . ."
>
> "Sec. 303. The comptroller general and the assistant comptroller general shall hold office during good behavior, but may be removed at any time by the Supreme Court of the United States after notice and hearing, when, in the judgment of the Supreme Court of the United States, the comptroller general or assistant comptroller general is incapacitated or inefficient, or has been guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and in no other manner except by impeachment."

Id. at 8648.

2. The proposed vesting of appointment and removal power in the Supreme Court proved controversial. 59 Cong. Rec. 8649-52 (1920). In response to this opposition, Representative Good proposed that section 302 provide for appointment by the President, with the advice and consent of the Senate. *Id.* at 8656. Similarly, he proposed to amend section 303 to provide: "The comptroller general and the assistant comptroller general shall hold office during good behavior." *Id.*

3. As so amended, H.R. 14,441 passed the House on June 5, 1920. 59 Cong. Rec. 8657 (1920). Senator Smoot

introduced H.R. 14,441 in the Senate, *id.* at 8625, but no vote was taken before the second session ended the same day. In the short third session, H.R. 14,441 was again raised in the Senate, but was passed over at the instance of Senator Smoot, who stated that a number of absent Senators wished to be present when the bill was considered. 60 Cong. Rec. 2001 (1921).

III. S. 1084—67th Congress

1. Senator McCormick introduced S. 1084. 61 Cong. Rec. 595 (1921).

2. Section 303 of S. 1084 provided for removal in the following terms:

> "That the comptroller general and the assistant comptroller general shall hold office for seven years, but may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the comptroller general or assistant comptroller general has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment."

61 Cong. Rec. 658 (1921).

3. S. 1084 passed the Senate. 61 Cong. Rec. 662 (1921).

4. At the same time that S. 1084 was proceeding in the Senate, the House was considering H.R. 30, which was introduced by Representative Good. 61 Cong. Rec. 87 (1921).

a. The House amended S. 1084 by striking everything following the enacting clause, and substituting the text of H.R. 30. 61 Cong. Rec. 974, 993-94, 1091-93 (1921).

b. Section 303 of H.R. 30 was the same as its counterpart in H.R. 9783 in the previous Congress. As H.R. 30

was initially introduced, it omitted one cause of removal present in H.R. 9783 (incapacitation). 61 Cong. Rec. 1079 (1921). That cause was reinstated by amendment. *Id.* at 1083.

5. S. 1084 (as amended by substitution of the text of H.R. 30) passed the House. 61 Cong. Rec. 1091-93 (1921).

6. The House and Senate conferees agreed to a revised section 303 identical to that which became law as section 303 of the Budget and Accounting Act of 1921. *See* S. Doc. No. 15, 67th Cong., 1st Sess. (1921), *reprinted in* 61 Cong. Rec. 1783, 1784-85 (1921).

7. S. 1084 passed the Senate on May 26, 1921. 61 Cong. Rec. 1783 (1921). It passed the House the next day. 61 Cong. Rec. 1859 (1921).

8. President Harding signed S. 1084 on June 10, 1921. *See* 61 Cong. Rec. 2500 (1921).

(10) (9) (9)

Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX—VOLUME I

ALAN B. MORRISON,
Counsel for Mike Synar, et al.,
2000 P St., N.W., Suite 700,
Washington, D.C. 20036.
(202) 785-3704

CHARLES FRIED,
Counsel for United States,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.
(202) 633-2201

LOIS G. WILLIAMS,
Counsel for National Treasury Employees Union,
1730 K St., N.W.,
Washington, D.C. 20006.
(202) 785-4411

LLOYD N. CUTLER,
Counsel for Comptroller General,
1666 K St., N.W.,
Washington, D.C. 20006.
(202) 872-6100

MICHAEL DAVIDSON,
Counsel for United States Senate,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

STEVEN R. ROSS,
Counsel for Thomas P. O'Neill, Jr., et al.,
H-105 The Capitol,
Washington, D.C. 20515.
(202) 225-9700

JURISDICTIONAL STATEMENTS FILED FEBRUARY 18, 1986
PROBABLE JURISDICTION NOTED FEBRUARY 24, 1986

97pb

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DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA NO. 85-3945, REPRESENTATIVE MIKE SYNAR, ET AL., PLAINTIFFS v. UNITED STATES OF AMERICA, DEFENDANT

1985

Dec. 12—Complaint, appearance.

Dec. 12—Summons (2) issued.

Dec. 12—Request by pltf for convening of Three-Judge Court; exhibit.

Dec. 19—Order directing that the deft United States of America shall file a responsive pleading by 12/30/85; further, if either House of Congress chooses to exercise its right to intervene, any pleadings it may wish to file shall be filed by 12/30/85; responsive pleading by pltf if any, shall be filed by 1/6/86; * * * this case shall be heard by the Court on 1/10/86 at 2:00 PM, Courtroom 21, Gasch, J.

Dec. 19—Amended complaint by pltf.

* * *

Dec. 30—Motion by deft. U.S.A. to dismiss; Memorandum; * * *

Dec. 30—Motion (unopposed) by Charles A. Bowsher, the Comptroller General of the United States, for leave to intervene as deft.; P & A's.

Dec. 30—Motion by Charles A. Bowsher, applicant-intervenor, for leave to file memorandum of P & A's. in excess of page limitation; Exhibit (Motion to dismiss).

Dec. 30—Motion by United States Senate to intervene as deft; Memorandum. * * *

Dec. 30—Motion by United States Senate, applicant-intervenor, for leave to exceed page limitation; Exhibit (Motion to dismiss.)

* * *

1986

Jan. 2—Order filed 12-31-85 granting the unopposed motion of the United States Senate for leave to intervene as a party deft.; granting unopposed motion of Charles A. Bowsher, Comptroller of the U.S. for leave to intervene as a party deft.; granting motions of the above named intervenor defts. for leave to file memoranda in excess of page limit set by Local Rule 1-9(f); further, directing that any replies to the pltfs.' responsive pleading be filed on Jan. 6, 1986, shall be filed by close of business on Jan. 8, 1986. Gasch, J.

Jan. 2—Motion by intervenor United States Senate to dismiss; Memorandum; * * *

Jan. 2—Motion by intervenor Charles A. Bowsher to dismiss; P & A's; * * *

Jan. 2—Order directing that civil action numbers 85-4106, 85-3945 be and hereby are, consolidated pursuant rule 42(a) of the FRCP; directing that pltf in CA No. 85-4106 shall file any pleadings it deems appropriate by 1/6/86 and the deft in CA No. 85-4106 shall file any responsive pleading and brief by close of business on 1/8/86; further directing that CA No. 85-4106 and CA No. 85-3945 shall be heard by the Court on 1/10/86 at 2 PM in Courtroom 21. Gasch, Scalia and Johnson, J.

Jan. 6—Motion of pltfs for summary judgment; statement of pursuant to Rule 1-9(i); memorandum in support.

Jan. 6—Memorandum of pltfs in opposition to motion of the U.S. to dismiss; affidavit of Mike Synar.

Jan. 8—Opposition of intervening deft. Comptroller General of the U.S. to pltfs.' motions for summary judgment; Affidavit of Charles A. Bowsher; Attachment A.

* * *

Jan. 9—Motion (filed 1-8-86) of intervenor United States Senate for leave to exceed page limits; Exhibits (Motion

to dismiss; Reply memorandum in support of its motion to dismiss and in opposition to pltfs' motion for summary judgment).

Jan. 9—Motion of U.S.A. for leave to file response in excess of page limitation; Exhibit (Cross motion for summary judgment; memorandum in support; statement of material facts).

Jan. 9—Motion of Speaker and Bipartisan Leadership Group of the U.S. House of Representatives to intervene; P&A's in support; Exhibit (Motion for leave to file its motions and memoranda on 1-8-86; Motion for leave to exceed page limits; Motion to dismiss; memorandum); * * * (File—after close of business—fiat) (Signed 1-9-86) Gasch, J.

Jan. 9—Order granting oral motion by the House of Representatives to intervene with directives. (See order for further details) (Signed 1-8-86) (N) Gasch, J.

Jan. 9—Motion of the Speaker and Bipartisan Leadership Group of the U.S. House of Representatives for leave to file its motions and memoranda on 1-8-86; Exhibits 1 and 2. (File—after close of business) (fiat 1-9-86) Gasch, J.

Jan. 9—Motion of intervenor Speaker and Bipartisan Leadership Group of the U.S. House of Representatives for leave to exceed page limits; Exhibit (Motion to dismiss for failure to state a claim).

Jan. 9—Supplemental memorandum of U.S. House of Representatives in support of their motion to intervene.

Jan. 10—Motion of intervenor Comptroller General for leave to file opposition to cross motion for summary judgment; Exhibit (Opposition to cross motion for summary judgment).

Jan. 10—Reply memorandum of Speaker and Bipartisan Leadership Group of the House of Representatives.

Jan. 13—Transcript of proceedings from 1-10-86; pages 1 thru 131; (Rep. Gloria Williams and Mindi Colchico).

Jan. 13—Memorandum of U.S. in support of cross motion for summary judgment and response to motions filed by

the various other parties; * * * ("File"—fiat 1-13-86) Gasch, J.

Jan. 14—Motion (as of 1-10-86) of pltfs and defts for summary judgment and motion of defts to dismiss the suit of the congressional pltfs argued, concluded and taken under advisement; parties to submit briefs by Friday, January 17, 1986 as to the "Fall Back Provision." (Rep: Gloria Williams and Mindi Colchico) Gasch, J.; Scalia, J.; and Johnson, J.

* * *

Jan. 14—Order filed 1-13-86 directing parties to provide supplemental briefs by 4:30 p.m., January 17, 1986. (N) Gasch, J. Scalia, J.; and Johnson, J.

Jan. 14—Supplemental brief filed 1-13-86 by the Speaker and Bipartisan Leadership Group of the House of Representatives.

Jan. 15—Motion by United States Senate, intervenor-deft., to supplement record; Exhibit (Joint Report of Directors of OMB-CBO).

Jan. 16—Supplemental memorandum of pltfs.

Jan. 17—Supplemental brief of intervenor U.S. Senate in response to 1-13-86 order.

Jan. 17—Supplemental brief of U.S.

Jan. 17—Supplemental memorandum of the Comptroller General on standing issues.

Jan. 17—Supplemental memorandum of National Treasury Employees Union in support their motion for summary judgment.

Jan. 21—Motion of intervening deft Comptroller General to supplement the record with the Report of the Comptroller General; Exhibit (Report).

Jan. 24—Order granting motion of Intervenor U.S. Senate to supplement the record with the joint report of Directors of OMB-CBO. (Signed 1-23-86) Gasch, J.

Jan. 24—Joint report of Office of Management and Budget, Congressional Budget Office to the Comptroller General of the U.S. Part IV, Book #2 of 2 Books.

Jan. 24—Order granting motion of intervening deft Comptroller General to supplement the record with the Report of the Comptroller General. (Signed 1-23-86) Gasch, J.

Jan. 24—Report of the Comptroller General titled: Budget Reductions for FY 1986.

Feb. 3—Motion of deft USA to supplement the record; Exhibit (Order).

Feb. 4—Order granting motion of the deft USA to supplement the record with order of the President issued on 2-1-86, and OMB Bulletin No. 86-7. Gasch, J.; Scalia, J.; Johnson, J.

Feb. 4—Order by USA re; Emergency Deficit Control Measures for Fiscal Year 1986.

Feb. 7—Memorandum. Gasch, J.; Scalia, J.; and Johnson, J.

Feb. 7—Order directing that the presidential sequestration order issued on 2-1-86 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect; further, directing that such action is without prejudice to implementation of the alternate deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation declared above; further, it is Ordered, pursuant to subsection 274(e) of the Act, that the effect of this judgment be, and hereby is, stayed during the pendency of any appeal taken under subsection 274(b) of the Act. (See memorandum and this order for full details). Gasch, J.; Scalia, J.; and Johnson, J.

Feb. 7—Notice of appeal by intervenor U.S. Senate to the U.S. Supreme Court from judgment/order entered 2-7-86. * * *

Feb. 7—Notice of appeal by the Comptroller General of the U.S. to the Supreme Court from judgment/order entered 2-7-86. * * *

Feb. 10—Notice of appeal by intervenors Speaker and Bipartisan Leadership Group from order entered 2-7-86.

Feb. 11—Response of deft to motion to amend complaint.

DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA NO. 85-4106, NATIONAL TREASURY EMPLOYEES UNION, PLAINTIFF v. UNITED STATES OF AMERICA, DEFENDANT

1985

Dec. 31—Complaint; appearance.

Dec. 31—Summons (2) issued.

1986

Jan. 6—Order filed 1-02-86 directing that C.A. Numbers 85-4106 and 85-3945 be, and hereby are, consolidated pursuant to Rule 42(a) F.R.C.P.: directing that pltf. in C.A. 85-4106 shall file any pleadings it deems appropriate by 1-06-86 and deft. in C.A. 85-4106 shall file any responsive pleading and brief by close of business on 1-08-86; further directing that C.A. 85-4106 and C.A. 85-3945 shall be heard by the Court on 1-10-86 at 2:00 p.m. in Courtroom 21. (Orig. filed in CA 85-3945) Gasch, J.

Jan. 6—Motion by pltf. for summary judgment; Memorandum; Statement of material facts.

* * *

[Note: Docket entries between filing on January 6, 1986 of motion of plaintiff National Treasury Employees Union, and the filing on January 21, 1986 of motions by Senate and Comptroller General to intervene, are identical to entries in No. 85-3945.]

Jan. 21—Motion of U.S. Senate to intervene * * *

Jan. 21—Motion of Charles A. Bowsher, the Comptroller General of the U.S. for leave to intervene as deft; * * *

Jan. 24—Order granting motion of U.S. Senate for leave to intervene (signed 1-23-86) Gasch, J.

Jan. 24—Order granting motion of Charles A. Bowsher, Comptroller General of the U.S. for leave to intervene. (Signed 1-23-86) Gasch, J.

* * *

[NOTE: Docket entries between entry of orders on January 24, 1986 granting motions to intervene, and filing of

the Memorandum Opinion on February 7, 1986 are identical to docket entries in No. 85-3945.]

Feb. 7—Memorandum. Gasch, J.; Scalia, J.; and Johnson, J. (Filed in 85-3945)

Feb. 7—Order directing that the presidential sequestration order issued on 2-1-86 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect; further, directing that such action is without prejudice to implementation of the alternate deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation declared above; further, it is Ordered, pursuant to subsection 247(e) of the Act, that the effect of this judgment be, and hereby is, stayed during the pendency of any appeal taken under subsection 274(b) of the Act. (See memorandum and this order for full details). Gasch, J.; Scalia, J.; and Johnson, J. (filed in 85-3945)

Feb. 7—Motion of National Treasury Employees Union to file amended complaint for declaratory relief; Exhibit (Amended Complaint for declaratory relief).

Feb. 7—Notice of appeal by intervenor U.S. Senate to the U.S. Supreme Court from judgment/order entered 2-7-86. * * *

Feb. 7—Notice of appeal by the Comptroller General of the U.S. to the Supreme Court from judgment/order entered 2-7-86. * * *

Feb. 10—Notice of appeal by intervenors Speaker and Bipartisan Leadership Group from order entered 2-7-86. (filed in 85-3945)

Feb. 11—Response of deft to motion to amend complaint. (filed in 85-3945)

Feb. 26—Order denying motion of plaintiff for leave to amend its complaint. (See order for details). Gasch, J.; Scalia, J.; and Johnson, J.

AMENDED COMPLAINT FOR DECLARATORY RELIEF, NO. 85–3945, REPRESENTATIVES MIKE SYNAR, GARY L. ACKERMAN, ALBERT G. BUSTAMANTE, SILVIO O. CONTE, DON EDWARDS, VIC FAZIO, ROBERT GARCIA, JOHN J. LAFALCE, JIM MOODY, CLAUDE D. PEPPER, ROBERT G. TORRICELLI, AND JAMES A. TRAFICANT, JR. v. UNITED STATES OF AMERICA, FILED DECEMBER 19, 1985, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1. This is an action seeking a declaratory judgment that the provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, Public Law 99–177, (the "Act"), which authorize reductions in federal spending other than by the passage of legislation requiring such reductions, are unconstitutional because they violate the lawmaking procedures of the Constitution and principles of separation of powers.

2. This Court has jurisdiction pursuant to paragraph 1 of subsection 274(a) of the Act. Paragraph 5 of that subsection requires this action to be heard by a three-judge court, pursuant to 28 U.S.C. § 2284, which is to consider the merits of this action on an expedited basis.

3. The plaintiffs are members of the United States House of Representatives, and as such are the statutorily-designated plaintiffs under the Act for this action.

4. The defendant is the United States of America.

BACKGROUND

5. On December 12, 1985, the President signed the Act into law, and it became effective immediately. The principal purpose of the Act is to create a mechanism by which the federal deficit can be reduced below the levels otherwise anticipated for the next six years, with the objective of achieving a balanced budget by fiscal 1991. The method chosen to accomplish this is a process described in sections 251 and 252 of the Act, which automatically causes across-the-board spending reductions (with certain exceptions and qualifications not relevant to this action) to go into effect through a Presidential order, if a determina-

tion is made that the spending levels in existing legislation, less anticipated revenues, will not meet the deficit target for that year as specified in the Act.

6. Under section 251, the determination described in paragraph 5 is initially made jointly by the Director of the Office of Management and Budget, an officer in the executive branch of the government, and the Director of the Congressional Budget Office, an officer in the legislative branch of the government. That determination is then reviewed by the Comptroller General, an official of the legislative branch, who issues a final determination to the President. That final determination is not subject to further review in any judicial or administrative proceeding, and under section 252 the President is obligated to carry out the budget cuts detailed in a report of the Comptroller General of which the determination is a part.

7. The determinations described in paragraph 6 are not merely ministerial or mathematical in nature, but involve substantial questions of judgment, discretion, and expertise in making a number of vital estimates on which the final determination is based. They do not constitute merely advice or recommendations, but are the triggers for the process by which billions of dollars will be eliminated from federal spending programs specifically provided for in other federal statutes.

CAUSES OF ACTION

8. Because the Presidential order accomplishing the spending reductions will have the effect of changing existing laws mandating higher levels of spending, it is valid only if the power to amend spending laws is one that can be delegated to the President and/or the others who make the determination on which the Presidential order is based. Article I, section 7 of the Constitution requires that all laws, including spending laws, be passed by both Houses of Congress and are either signed by the President or approved by two-thirds of each House following a veto. Since the process of amending spending laws provid-

ed in the Act does not meet those requirements, it is constitutionally invalid as an unauthorized attempt to make law.

9. Even if the power to alter spending levels provided for in the Act could constitutionally be delegated by Congress, the delegation in this Act is still invalid because it is made to the Director of the Office of Management and Budget, the Director of the Congressional Budget Office, and the Comptroller General, and only the first of these is an official of the executive branch. Because of the participation in the determination by the Director of the Congressional Budget Office and the Comptroller General, both of whom are officials of the legislative branch, the delegation is unconstitutional as a violation of principles of separation of powers.

10. The plaintiffs are injured by these unconstitutional provisions because (a) they interfere with their constitutional duties to enact laws regarding federal spending; (b) their salary and those of their staffs, as well as their office expenses, will be automatically reduced if a determination is made that the deficit target for a given year has not been met; and (c) thousands of their constituents will be injured through automatic reductions in a variety of programs if a determination is made that the applicable deficit target has not been met.

11. Unless this Court declares that sections 251 and 252 of the Act are unconstitutional, they will go into effect, and plaintiffs and millions of others will be adversely affected by the resulting budget reductions.

WHEREFORE, plaintiffs pray that the Court

1. Request the immediate convening of a three-judge court, pursuant to 28 U.S.C. § 2284;

2. Declare that the provisions of sections 251 and 252 of the Act, providing for automatic reductions in statutory spending levels based on determinations made pursuant to those sections, are unconstitutional as violations of the lawmaking procedures in Article I, section 7 of the Constitution and the principles of separation of powers;

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3. Declare that the power of the President to order spending reductions is invalid and of no further force and effect;

4. Grant plaintiffs their costs and disbursements in this action, including reasonable attorneys' fees pursuant to 28 U.S.C. § 2412; and

5. Grant plaintiffs such other and further relief as may be just and proper.

/s/ ALAN B. MORRISON,

/s/ KATHERINE A. MEYER,

Attorneys for the Plaintiffs.

DECEMBER 19, 1985.

COMPLAINT FOR DECLARATORY RELIEF, NO. 85–4106, NATIONAL TREASURY EMPLOYEES UNION v. UNITED STATES OF AMERICA, FILED DECEMBER 31, 1985, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

INTRODUCTION

The claims presented in this complaint arise from the enactment of the Balanced Budget and Emergency Control Act of 1985 (the "Act"). That statute creates a procedure designed to reduce the federal deficit with the aim of securing a balanced federal budget by 1991. Key provisions of the Act which authorize cuts in federal spending are, however, unconstitutional because they contravene the lawmaking requirements of the Constitution as well as principles of separation of powers.

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sections 1331 and subsection 274(a) of the Act. Section 274(a) requires that this action be heard by a three-judge court, pursuant to 28 U.S.C. 2284. The merits of the action are required to be heard on an expedited basis.

VENUE

2. Venue is properly laid before the Court pursuant to 28 U.S.C. 1391(e).

PARTIES

3. Plaintiff National Treasury employees Union (hereinafter referred to as NTEU) is an unincorporated association having its principal place of business at 1730 K Street, N.W., Suite 1101, Washington, D.C. 20006. Pursuant to Title VII of the Civil Service Reform Act of 1978, Public Law 95–454, 92 Stat. 1111, NTEU is the exclusive bargaining representative of approximately 120,000 federal employees. NTEU represents the employment interests of federal employees throughout the nation by, *inter alia*, negotiating collective bargaining agreements, arbitrating

grievances under such agreements, filing unfair labor practice charges, lobbying Congress for favorable working conditions, pay, and benefits, and litigating the individual and collective rights of federal employees in the federal courts. Among its members are 9,000 retired federal employees. NTEU sues here on behalf of its members.

4. Defendant is the United States of America.

STATEMENT OF CLAIMS

5. The President signed the Act into law on December 12, 1985. The Act took effect immediately. Sections 251 and 252 of the Act create a procedure for across-the-board spending cuts if it is found that certain deficit targets, specified in the Act, cannot be met in a particular fiscal year.

6. This critical finding is jointly made at first by the Director of the Office of Management and Budget, an executive branch officer, and the Director of the Congressional Budget Office, a legislative branch officer. The Comptroller General, a legislative branch officer, then reviews their determination and issues a final determination to the President. Under section 252 of the Act, the President must then carry out these budget cuts which are fully described in a Comptroller General report.

7. The determinations described above entail the exercise of considerable judgment. They are not simply ministerial or precatory but actually initiate the process for cutting billions of dollars in federal spending.

CAUSES OF ACTION

8. The Presidential order implementing the spending cuts effectively modifies already enacted legislation requiring higher spending levels. The Presidential order is legal only if the power it exercises has been validly delegated to the President and the other government officers who participate in the Act's spending cutting mechanism. Because the Act's prescribed procedures for spending cuts do not satisfy the lawmaking provisions of Article I, sec-

tion 7 of the Constitution, that process is unconstitutional.

9. Even if the Act's spending cutting procedure could be legally delegated, the particular delegation process established in the Act is invalid. That delegation procedure involves members of both the legislative and executive branches and accordingly, violates the Constitution's separation of powers scheme.

10. The plaintiff's members, including those who are retired federal employees, are injured by these unconstitutional provisions. For example, as a result of the "automatic" spending cutting provisions described above, a cost-of-living-adjustment due federal retirees on January 1, 1986, has been withheld. Unless this Court declares sections 251 and 252 of the Act unconstitutional, they will take full effect and plaintiff's members will continue to be adversely affected by the budget reduction provision.

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiff requests that the Court

1. Immediately convene a three-judge court pursuant to 28 U.S.C. 2284;

2. Declare sections 251 and 252 of the Act unconstitutional;

3. Declare that the President's power to order spending reductions is invalid;

4. Grant plaintiff a reasonable amount of attorneys' fees and costs;

5. Grant plaintiff such other and further relief as may be just and proper.

Respectfully submitted,

/s/ LOIS G. WILLIAMS,
Director of Litigation,

/s/ GREGORY O'DUDEN,
Assistant Director of Litigation,
National Treasury Employees Union,
Attorneys for the Plaintiffs.

AFFIDAVIT OF REPRESENTATIVE MIKE SYNAR, FILED JANUARY 6, 1986, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (Title of case omitted in printing)

MIKE SYNAR hereby declares and states as follows:

1. I am one of the plaintiffs in this action. I am a member of the United States House of Representatives, representing the Second District of Oklahoma. The citizens of my district are the annual beneficiaries of millions of federal dollars appropriated by Congress.

2. I am a member of the House Committee on Government Operations, and as such was one of the conferees who participated in the drafting of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Budget Act"). I am also a member of the Committee on Energy and Commerce, the Committee on the Judiciary, and the Subcommittee on Health & Long-term Care of the Select Committee on Aging. As a conferee on the Budget Act, I played an active role in the debates surrounding the constitutionality of the Act, and I am extremely familiar with both the intent and operation of that legislation.

3. I believe that the mechanism established in the Budget Act for reducing the federal deficit is unconstitutional because it provides for a system of law-making other than the one prescribed by Article I, section 7 of the Constitution. Assuming that Congress can delegate its spending powers, I further believe that the delegation under the Budget Act is unconstitutional as a violation of the principles of separation of powers.

4. In my participation in the deliberations over the Budget Act, I made vigorous efforts to ensure that the legislation as finally enacted would be constitutional. However, because I believed that the final legislation was not constitutional for the reasons described in the complaint and in paragraph 3, I voted against it in conference.

5. I will be directly injured by the Budget Act because one immediate effect of a Presidential sequestration order

issued pursuant to the Act would be the automatic reduction of my congressional salary, as well as the salaries and resources available for my staff. The basis for my belief that these expenses will be cut is based on my knowledge of the Budget Act, and is explained in detail in plaintiffs' memorandum in response to the Department of Justice's motion to dismiss. That such reductions are a virtual certainty has always been my understanding, as well as the understanding of the other conferees. *See* Conference Report, No. 99-433, 99th Cong., 1st Sess. 100 (1985). Any reduction in my office expenses and those of my committee staffs adversely affects my ability to carry out my congressional duties on behalf of my constituents.

6. My constituents will also be injured by the Budget Act which is designed to cause automatic reductions in numerous programs upon which they rely for various federal entitlements and benefits. Thus, for example, thousands of my constituents who rely on federal farm subsidies, federal grants for legal services, numerous federal research grants, etc., will be injured upon the issuance of a sequestration order, since the funds allocated by Congress for such programs will automatically be reduced. Doubtless, there will be many others who are injured, but there is no purpose to be served by identifying them further.

7. I am further injured by the Budget Act because it interferes with the law-making and spending powers that have been conferred on me as a member of Congress under the Constitution. In fact, the Act has already interfered with my congressional deliberations over the current continuing budget resolution, since the fact that the budget determinations made by Congress are subject to change through the issuance of a sequestration order adversely affected the negotiations over the resolution, as it will surely continue to do with respect to all future congressional budget deliberations. Thus, there is little incentive for members of Congress to negotiate or compromise on individual budget items, when those who agree to

reductions will be faced with further reductions for the same item, once a sequestration order is issued.

8. It was because of the Conferees' concern that Congress will not meet the first deficit target established by the Act, and its desire to avoid the substantial disruption to the nation's economy and welfare that can result from a sequestration order that is later held to be unconstitutional, that they agreed to include in the Act a specific provision conferring standing on any member of Congress to seek immediate judicial review of the constitutionality of the Act. Section 274(a)(1). In that provision, Congress intended to make it clear that it wants the Judicial Branch to resolve the merits of the constitutional questions raised by the Budget Act as quickly as possible, so that if the sequestration mechanism is declared invalid, the "fall-back" provision, which everyone concedes is constitutional, can be implemented. This judicial review provision was an essential part of the legislative compromise that led to passage of the Act.

9. My staff and I have spoken to the staffs of all of the other plaintiffs in this action, and they assure me that the other plaintiffs share the same concerns about the constitutionality of the Budget Act and the injuries that it causes them and their constituents, that I have expressed in this affidavit.

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 3, 1986.

/s/ Representative Mike Synar.

AFFIDAVIT OF CHARLES A. BOWSHER, FILED JANUARY 8, 1986, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (Title of case omitted in printing)

I, CHARLES A. BOWSHER, being first duly sworn, do declare and say as follows:

1. I was appointed to the office of Comptroller General of the United States for a term of 15 years by President Ronald Reagan, effective October 1, 1981. Prior to my appointment, I was a partner with the public accounting firm of Arthur Andersen and Company. I served as the Assistant Secretary of the Navy for Financial Management, with the responsibilities of the Navy Comptroller and Chief Financial Officer, from 1967 to 1971.

2. I closely followed congressional development and consideration of the legislative proposals that became the Balanced Budget and Emergency Deficit Control Act of 1985 ("the Act"). When it appeared to me likely that I and the agency that I head, the General Accounting Office ("GAO"), would play a significant role in executing the Act, I assigned responsibility for GAO's role to Assistant Comptroller General Harry S. Havens, and directed him to develop and present to me a plan for carrying out the agency's responsibilities.

3. I selected Mr. Havens for this assignment in part because of his extensive knowledge and experience in federal budget preparation and execution. From 1964 to 1974, he served in positions of increasing responsibility in the Office of Management and Budget ("OMB"), including Deputy Director, Human Resources Division, and Chief, Income Maintenance Branch. At GAO he served from 1974 to 1980 as director of the Program Analysis Division, which brought together GAO's capabilities in economic and budget analysis. He has served as an Assistant Comptroller General of the United States since 1980. Four days after the Act was signed by President Reagan, I approved the plan developed by Mr. Havens.

4. The plan I approved established an *ad hoc* organization within GAO to fulfill our responsibilities under the Act and assigned senior GAO staff members to begin immediately working full-time on the task. Those staff members include Dr. Lawrence H. Thompson, Chief Economist of the GAO, who will be responsible for economic assumptions, revenue estimates, estimates of entitlement programs, and estimates of interest expenses. Dr. Thompson received his Ph.D. in economics from the University of Michigan in 1971. As Associate Commissioner for Policy (1979–1981) and Director of Research and Statistics (1981–1983) of the Social Security Administration, Dr. Thompson had responsibilities that included the preparation of cost and revenue forecasts for the Social Security program and cost forecasts for the Aid to Families with Dependent Children and Supplemental Security Income programs. Other economists assisting Dr. Thompson include Dr. Stephen Brooks, a full-time consultant to GAO who was formerly the Senior Staff Economist with the President's Council of Economic Advisors responsible for macroeconomic forecasting and analysis and federal budget policy; and Dr. Jonathan Ratner, formerly a professor of economics at the State University of New York at Albany, specializing in macroeconomics, applied econometrics, and forecasting.

5. The staff also includes James F. Hinchman, responsible for legal issues associated with GAO's responsibility under the Act. Mr. Hinchman is Deputy General Counsel for GAO. Prior to joining GAO, Mr. Hinchman served for nearly 15 years in legal and policy positions in federal executive departments, including service as Associate General Counsel for the Department of Health, Education and Welfare; Deputy Associate Director of OMB for Labor, Veterans and Education; and Assistant General Counsel of the Department of Agriculture.

6. The implementation effort draws upon GAO economists, budget analysts, and other experts with broad experience in budget analysis and economics with GAO, the

Department of Defense, and other executive departments. Recent GAO reports illustrative of our work in this area include our September 1985 report identifying excessive estimates of inflation in DOD budget requests during the 1980s. (A copy of that report is attached as Exhibit A.) Donna M. Heivilin, who directed the preparation of the report, is GAO's team leader for implementing the Act in the area of defense programs. She has broad experience designing and implementing information systems for military program, policy, and budget data collection and analysis.

7. It is my professional judgment that GAO, with a staff of over 5,000, including approximately 4,000 in professional positions, can accomplish the tasks required to support my role under the Act. Nevertheless, in order to augment GAO's resources, I have arranged two groups of consultants to advise me and the GAO staff. The first will include Dr. Bruce MacLaury, former President of the Federal Reserve Bank of Minneapolis and now President of the Brookings Institution; and Lyle E. Gramley, former Member of the Board of Governors of the Federal Reserve System and Member of the Council of Economic Advisers, and now Chief Economist of the Mortgage Bankers Association. That panel will provide advice on economic assumptions, revenue estimates, and estimates of entitlement programs and interest expenses. The second panel consists of Robert C. Moot, former Assistant Secretary of Defense (Comptroller); Don R. Brazier, former Principal Deputy Assistant Secretary of Defense (Comptroller); and Rear Admiral (ret.) Stanley S. Fine, former Budget Officer for the Department of the Navy. This group will provide advice on issues that arise in implementation of the Act with respect to Defense programs.

8. In view of the short time available to prepare our 1986 report on deficit reductions, I met with James C. Miller, III, Director of the Office of Management and Budget, and Rudolph G. Penner, Director of the Congressional Budget Office, on December 24, 1985, to arrange

for cooperation between the staffs of GAO, OMB, and CBO. This cooperation is intended to assure that GAO will understand the assumptions used and the theories underlying the report of the Directors when submitted to me on January 15. This understanding will facilitate our independent review of that report and the preparation of my report for submission to the President on January 21, 1986.

9. Since my meeting with Messrs. Miller and Penner, there have been frequent discussions between the staff of GAO and those of CBO and OMB on a variety of procedural, technical, and legal issues. I personally met with Robert W. Helm, Comptroller of the Department of Defense, on January 2, to discuss cooperation between that Department's budget staff and GAO. I believe that we have the cooperation of OMB and CBO in obtaining data and information that will facilitate our independent review of the Directors' January 15 report. For example, on January 9, when OMB and CBO have compiled the data necessary for preparation of the Directors' January 15 report, those data will be made available to the GAO staff, so that GAO's work reviewing the data can begin in advance of receiving the Directors' report.

10. Meanwhile, based on the data the GAO has independently collected, it is clear to me that the conceivable range of estimates of fiscal year 1986 budget outlays and revenues will not result in a deficit that reduces the required level of sequestration below the statutory maximum for that year of $11.7 billion. Accordingly, the first fiscal year for which the Comptroller General's estimates of budget outlays and revenues and the resulting estimated deficit can have a critical effect on the required level of sequestration will almost certainly be fiscal year 1987.

11. Because of the resources available within GAO and from its consulting groups, and the early organization and planning for implementation, I believe that I can

fully and independently perform the responsibilities that the Act assigns to me.

/s/ CHARLES A. BOWSHER,
Comptroller General of the United States.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS.

Civil Action No. 85-3945

NATIONAL TREASURY EMPLOYEES UNION, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS.

Civil Action No. 85-4106

Filed, February 7, 1986, James E. Davey, Clerk

Before SCALIA, *Circuit Judge* of the United States Court of Appeals for the District of Columbia Circuit, JOHNSON, *District Judge* of the United States District Court for the District of Columbia, and GASCH, *Senior District Judge* of the United States District Court for the District of Columbia.

PER CURIAM:

Plaintiffs in these consolidated cases challenge the constitutionality of certain features of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037, popularly known as the Gramm-Rudman-Hollings Act, signed into law by President Reagan on December 12, 1985. The principal issues presented are whether the plaintiffs, Members of Congress

and the National Treasury Employees Union, have standing to litigate the points they raise; whether the Act unconstitutionally delegates legislative powers that may be exercised only by Congress; and, if not, whether it confers upon the Comptroller General executive powers that may not constitutionally be given to an officer removable by Congress. We find that plaintiffs in both cases have standing, and that the powers in question may lawfully be delegated, but that the delegation to the Comptroller General violates the constitutionally requisite separation of powers.

I

In the Act, Congress has set a "maximum deficit amount" for each of the fiscal years 1986 through 1991, its size progressively reducing to zero in fiscal year 1991. Section 251 provides that each year the Directors of the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO") shall estimate the amount of the deficit for the upcoming fiscal year, and, if it exceeds the maximum deficit amount for that fiscal year by more than a specified amount, shall calculate, program by program pursuant to rules specified in the Act, the budget reductions necessary to ensure that the deficit does not exceed the maximum deficit amount for that year. The Directors must jointly report their deficit estimates and budget reduction calculations to the Comptroller General. After reviewing the Directors' report, the Comptroller General must issue his own report, containing his deficit estimates and budget reduction calculations, to the President and Congress. Section 252 of the Act requires the President to issue a "sequestration" order containing the budget reductions specified by the Comptroller General. After a prescribed time, the sequestration order becomes effective and the spending reductions included in that order are automatically made. The automatic deficit reduction process for fiscal year 1986 has progressed to the point of issuance, on February 1, 1986, of the presidential sequestration order, which will

take effect on March 1, 1986. *See Order, Emergency Deficit Control Measures for Fiscal Year 1986* (Feb. 1, 1986).

The Act also provides what might be called a "fallback" deficit reduction process, to take effect if any of the reporting procedures of the above-described "automatic" deficit reduction process are found unconstitutional. Under the fallback process, the report prepared by the Directors of the OMB and the CBO is submitted, instead of to the Comptroller General, to a special joint committee of Congress, which must in five days report to both Houses a joint resolution setting forth the contents of the Directors' report. The joint resolution is then considered under special rules, and, if passed and signed by the President, serves as the basis for the presidential sequestration order under section 252.

Civil Action No. 85-3945, seeking declaratory relief against the United States, was commenced on December 12, 1985 by Mike Synar, a Member of the House of Representatives who voted against the Act. An amended complaint, filed on December 19, 1985, added as plaintiffs eleven other Representatives who voted against the Act. Jurisdiction is averred to exist pursuant to subsection 274(a)(1) of the Act, which authorizes any Member of Congress to bring an action in this court "for declaratory and injunctive relief on the ground that any [presidential] order that might be issued pursuant to section 252 violates the Constitution." [1]

The complaint alleges that the automatic deficit reduction process, under which the President is required by section 252 to issue a sequestration order implementing the report issued by the Comptroller General pursuant to section 251, is unconstitutional in two respects. Plaintiffs' first contention, briefly and essentially, is that the delega-

[1] Subsection 274(a)(5) provides that any such action "shall be heard and determined by a three-judge court in accordance with [28 U.S.C. § 2284]." A designation of judges to serve as the three-judge district court in this case was made by the Chief Judge for the District of Columbia Circuit on December 16, 1985.

tion of power by Congress to the President and other government officials is an unconstitutional delegation of legislative power. Their second contention is that the powers assigned to the Comptroller General and the Director of the CBO, both deemed legislative branch officials by plaintiffs, constitutionally must be assigned to executive branch officials. The Representatives allege that these unconstitutional provisions injure them by (1) interfering with their constitutional duties to enact laws regarding federal spending; (2) causing automatic reductions in their salaries, staff salaries, and office expenses; and (3) causing automatic reductions in a variety of programs benefiting their constituents. They seek a judgment declaring that the automatic deficit reduction process is unconstitutional and that the President is without power, therefore, to order spending reductions pursuant to that process.

In response to the *Synar* complaint, the United States filed a motion to dismiss on the ground that the congressional plaintiffs lack standing to bring the action. The United States Senate and the Comptroller General moved for leave to intervene as defendants and also filed motions to dismiss on the ground that the Act is constitutional. The unopposed motions to intervene were granted on December 31, 1985.

Civil Action No. 85-4106, challenging the constitutionality of the automatic deficit reduction process on legal theories identical to those presented in the *Synar* action, was filed on December 31, 1985 by the National Treasury Employees Union ("NTEU"). NTEU, an unincorporated association representing the interests of both active and retired federal employees, alleges that its retired members have been injured as a result of the Act's automatic spending reduction provisions, which have operated to suspend cost-of-living adjustments ("COLAs") otherwise due federal retirees on January 1, 1986, and which will operate to cancel those COLAs and other COLAs due in the future. NTEU invokes the court's jurisdiction pursu-

ant to 28 U.S.C. § 1331 and to subsection 274(a)(2) of the Act, which provides, in pertinent part, that "any other person adversely affected by an action taken under this title, may bring an action [in this court] for declaratory judgment and injunctive relief concerning the constitutionality of this title." By Order dated January 2, 1986, the NTEU suit was consolidated with the earlier action.

Subsequent to consolidation, the congressional plaintiffs and NTEU filed their respective motions for summary judgment on January 6, 1986. The congressional plaintiffs also filed an opposition to the motion of the United States to dismiss their complaint for lack of standing. Thereafter, on January 8, 1986, the Speaker and Bipartisan Leadership Group of the United States House of Representatives, granted leave to intervene as a defendant in the consolidated cases, filed a memorandum of law in support of the constitutionality of the Act.

The United States filed a cross-motion for summary judgment, again contending that the complaint of the congressional plaintiffs must be dismissed for lack of standing but conceding that NTEU appears to have standing. On the merits, the position of the United States is that the Act does not unconstitutionally delegate legislative authority but that the role of the Comptroller General in the automatic deficit reduction process violates the principle of separation of powers.[2]

The motions of plaintiffs for summary judgment, as well as the cross-motion of the United States for summary judgment on the merits, are opposed by the Senate, the Comptroller General, and the Speaker and Bipartisan Leadership Group of the United States House of Representatives. Argument on these dispositive motions was

[2] The United States has also requested us to declare that the fallback deficit reduction process contained in § 274 of the Act is constitutional. Although we see no reason to doubt that proposition, the issue simply is not before this court. The plaintiffs have conceded the constitutionality of the fallback process, and the United States—the nominal *defendant*—has not set forth any claim for relief in its own behalf.

heard on January 10, 1986, and the cases taken under advisement. By Order dated January 23, 1986, the Senate and the Comptroller General were granted leave to intervene in the NTEU action.

II

In view of the established rule that "consolidation . . . does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another," *Johnson v. Manhattan Railway*, 289 U.S. 479, 496–97 (1933); *see also McKenzie v. United States*, 678 F.2d 571, 574 (5th Cir. 1982), we find it necessary to make separate standing determinations with respect to the plaintiffs in each case under consideration. Moreover, even though the standing of NTEU has not been directly challenged, we must satisfy ourselves that NTEU has standing before we can proceed to consider its claims. Article III circumscribes the power of federal courts, and "[t]hose who do not possess Art. III standing may not litigate as suitors in the courts of the United States." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 475–76 (1982). Before turning to a particularized analysis of whether NTEU and the congressional plaintiffs have made the necessary showing for standing in their respective cases, a brief general discussion of the applicable principles is appropriate.

While the plaintiffs invoke this court's jurisdiction under the judicial review provisions contained in section 274 of the Act, they concede, as they must, that Congress may not abrogate the constitutional limitations imposed by Article III upon the power of the federal courts. *See Gladstone, Realtors v. Village of Bellwood,* 441 U.S. 91 (1979); *Muskrat v. United States,* 219 U.S. 346 (1911). Article III limits the jurisdiction of federal courts to "cases or controversies," and "whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III . . . . is the threshold question in every federal case." *Warth v. Seldin,* 422 U.S.

490, 498 (1975). Principles of standing ensure that one who invokes the power of a federal court satisfies this "case or controversy" requirement.

Although the Supreme Court has noted that "the concept of 'Art. III standing' has not been defined with complete consistency in all of the various cases decided by this Court which have discussed it," *Valley Forge Christian College,* 454 U.S. at 475, the Court has repeatedly recognized that the concept entails certain basic requirements. The first and most fundamental of these is that a party must allege a "distinct and palpable injury to himself." *Warth v. Seldin,* 422 U.S. at 501. This injury must be a "particular concrete injury," *United States v. Richardson,* 418 U.S. 166, 177 (1974), which must amount to "a claim of specific present objective harm or a threat of specific future harm." *Laird v. Tatum,* 408 U.S. 1, 14 (1972). A plaintiff need not await the consummation of a threatened injury in order to have standing; it is sufficient that the injury is imminent. *Babbitt v. United Farm Workers National Union,* 442 U.S. 289, 298 (1979). The further requirements of Article III standing are set forth in the Supreme Court's recent formulation that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to [show] . . . that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College,* 454 U.S. at 472 (quoting *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 38, 41 (1976)); *see also Allen v. Wright,* 104 S. Ct. 3315 (1984).

Thus, at a minimum, Article III requires NTEU and the congressional plaintiffs to show (1) actual or threatened injury, (2) traceable to the defendant, and (3) amenable to judicial remedy.[3] In analyzing whether they have

[3] In the ordinary case, other limitations on standing exist—so-called "prudential" limitations, not strictly required by Article III. One of these that might normally have some effect in the present case is the requirement that the plaintiff be arguably within the "zone of inter-

Continued

done so, we must accept as true all material allegations of the complaints and construe them in favor of the complaining parties. *Warth v. Seldin,* 422 U.S. at 501. We therefore assume, for the limited purpose of the following standing analysis, that the automatic deficit reduction process challenged by plaintiffs is unconstitutional.

A

NTEU contends that it has standing to bring this action because subsection 252(a)(6)(C)(i) of the Act, as part of the automatic deficit reduction process, has operated to suspend payment of annual COLA benefits otherwise due those of its members who are federal retirees. NTEU also complains that, effective March 1, 1986, the presidential sequestration order issued on February 1, 1986 will permanently cancel retirees' COLA benefits for this fiscal year.[4] It claims that these actual and threatened injuries have been and will be caused by the automatic deficit reduction process and would be redressed if that process were declared unconstitutional.

It is well established that an association such as NTEU has standing to sue solely as the representative of its

ests" intended to be protected by the statutory or constitutional provision on which he relies. *See, e.g., Valley Forge Christian College,* 454 U.S. at 475. We disregard these prudential limitations because we think it clear that Congress has, by enacting the judicial review provisions contained in § 274, expanded standing to challenge the constitutionality of the Act to the full extent permitted by Article III. cf. Gladstone, Realtors v. *Village of Bellwood,* 441 U.S. at 100.

[4] Subsection 252(a)(6)(C)(i) provides, in pertinent part:

> Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be . . . paid [between the enactment of the Act and the effective date of a sequestration order for fiscal year 1986] shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during [fiscal year 1986], the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled.

members, provided that they individually would have standing. *Warth v. Seldin*, 422 U.S. at 511. There is no question that NTEU's federal retiree members have suffered actual injury by the suspension of their COLA benefits pursuant to the Act, and that they will suffer further injury by the permanent cancellation of those benefits on March 1, 1986, under the terms of the President's February 1 sequestration order. *See Order, Emergency Deficit Control Measures for Fiscal Year 1986* 1, 4 (Feb. 1, 1986). We conclude that NTEU has made a sufficient showing of injury to satisfy Article III's threshold requirement of injury-in-fact.

We must also consider the question of redressability, *i.e.*, whether it is likely that the relief requested will redress the injury complained of, before a finding of standing can be made. As to at least the second of the injuries of which NTEU complains—the imminent permanent cancellation of its members' COLA benefits by the operation of the presidential sequestration order—it is unquestionable that a judicial remedy exists. If we declare the automatic deficit reduction process invalid, no cancellation of the COLA benefits will occur as a result of that process.[5] Rather, the fallback deficit reduction process established by subsection 274(f) will come into play,[6] and any cancellation of COLAs under that process will require the passage of legislation. The mere possibility that subsequent legislation might produce the same harm for which a judicial remedy is sought is not sufficient to

[5] Although the provision for COLA suspensions would survive invalidation of the portions of the Act under challenge here, it cannot be argued that indefinite suspension (*i.e.*, suspension unless and until a joint resolution is enacted) would render our invalidation of automatic cancellation illusory. It is clear from the language and structure of § 252(a)(6)(C)(i)-(ii) that any COLA suspension would extend no longer than one fiscal year.

[6] In light of the existence of the fallback process and the fact that the remainder of the Act, as supplemented by that process, functions as a coherent piece of legislation, there is no doubt that the automatic deficit reduction process is severable from the remainder of the Act.

eliminate redressability and hence standing. *Cf. Orr v. Orr,* 440 U.S. 268, 272 (1979).

Because the threatened injury of permanent cancellation of the COLA benefits pursuant to an unconstitutional process may be redressed, we conclude that NTEU has standing to bring its action.

B

Of the three types of injury that the congressional plaintiffs rely upon for standing, briefly outlined above, we need consider only their claim that the automatic deficit reduction process interferes with their constitutional duties to enact laws regarding federal spending and infringes upon their lawmaking powers under the Constitution, in that spending reductions made pursuant to the challenged process will, in effect, override earlier, duly enacted appropriations laws in a manner other than that prescribed by Article I, section 7. In response, the United States contends that this injury is nothing more than a generalized grievance shared by all other citizens and thus insufficient to support standing.

Under the law of this Circuit, which recognizes a personal interest by Members of Congress in the exercise of their governmental powers, limited by an equitable discretion in the courts to withhold specific relief,[7] we conclude that standing exists. Although it is somewhat difficult to reconcile the various cases on congressional standing in this Circuit, and in particular to tell which denials of relief in earlier cases, seemingly for lack of standing, are now to be explained, in light of later cases, as resting upon an exercise of equitable discretion, the cases clearly

[7] Two judges of the Court of Appeals, including a member of the present panel, have expressed disagreement with this analysis, *see Barnes v. Kline,* 759 F.2d 21, 41 (D.C. Cir. 1985) (Bork, J., dissenting), *petition for cert. filed,* 54 U.S.L.W. 3346 (U.S. Nov. 5, 1985) (No. 85-781); *Moore v. United States House of Representatives,* 733 F.2d 946, 956 (D.C. Cir. 1984) (Scalia, J., concurring), *cert. denied,* 105 S. Ct. 779 (1985). It has, however, been adopted by several panels of the Court of Appeals and is the law of this Circuit.

recognize that specific injury to a legislator in his official capacity may constitute cognizable harm sufficient to confer standing upon him. *See, e.g., Moore v. United States House of Representatives,* 733 F.2d 946, 952 (D.C. Cir. 1984), *cert. denied,* 105 S. Ct. 779 (1985); *Vander Jagt v. O'Neill,* 699 F.2d 1166 (D.C. Cir.), *cert. denied,* 464 U.S. 823 (1983); *Riegle v. Federal Open Market Committee,* 656 F.2d 873 (D.C. Cir. 1984), *cert. denied,* 454 U.S. 1082 (1981). More specifically our Court of Appeals has held that "unconstitutional deprivations of a legislator's constitutional duties or rights . . . may give rise to standing if the injuries are specific and discernible." *Moore v. United States House of Representatives,* 733 F.2d at 952 (citing *Kennedy v. Sampson,* 511 F.2d 430 (D.C. Cir. 1974); *Harrington v. Bush,* 553 F.2d 190 (D.C. Cir. 1977); and *American Federation of Government Employees v. Pierce,* 697 F.2d 303 (D.C. Cir. 1982) (per curiam)). Put another way, a Member of Congress may have standing where he alleges a " 'specific and cognizable' [injury] arising out of an interest " 'positively identified by the Constitution.' " *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d 1375, 1381 (D.C. Cir. 1984) (quoting *Moore v. United States House of Representatives,* 733 F.2d at 951).

Applying these standards to the instant case, we conclude that plaintiffs have alleged specific and cognizable injury sufficient to establish standing in their official capacities. The congressional plaintiffs claim that they are and will continue to be injured by the operation of the automatic deficit reduction process because it interferes with their "constitutional duties to enact laws regarding federal spending" and infringes upon their lawmaking powers under Article I, section 7. Accepting as true plaintiffs' allegations, as we must for purposes of determining their standing, the Act unconstitutionally gives to the Comptroller General and the President formal power to amend or repeal appropriations legislation that was lawfully passed, and thus effectively to nullify plaintiffs' votes on that earlier legislation. This claim of injury is

"specific" and "discernible"; and it arises out of an interest "identified by the Constitution," that is, a congressional interest in having all laws made in the manner prescribed under the general lawmaking provision contained in Article I, section 7. This interest differs significantly from the more abstract and generalized interest unsuccessfully asserted by lawmakers in *United Presbyterian Church in the U.S.A. v. Reagan,* 738 F.2d at 1375, and *Harrington v. Bush,* 553 F.2d at 190, *viz.,* the interest in preventing unlawful executive enforcement of a statute from "diminishing the effectiveness" of, or "nullifying," past votes on that statute. Permitting lawmakers to assert the latter interest would be tantamount to giving them standing to challenge the lawfulness of all executive action taken under a statute; entertaining the present suit would not.

Finally, we find no occasion to consider exercising the equitable discretion held by this circuit's cases to justify denial of specific or declaratory relief to Members of Congress. Section 274 of the Act specifically provides for such relief to such plaintiffs, thus eliminating whatever equitable discretion might exist and leaving only the limitations of Article III.

III

Plaintiffs contend that the Act's delegation to administrative officials of the power to make the economic calculations that determine the estimated federal deficit and hence the required budget cuts violates the constitutional provision vesting "all legislative power" in the Congress. *See* Art. I, § 1. It is strictly unnecessary for us to reach this point, since we hold in Part IV of this opinion that the challenged provisions of the Act are unconstitutional on other grounds. We think it appropriate, however, in light of the injunction of subsection 274(c) of the Act that we "expedite to the greatest possible extent the disposition" of these cases, and in light of the direct appeal to the Supreme Court provided by subsection 274(b), that we depart from normal prudential practice and provide our

views *obiter dicta*. We thereby avoid the necessity that the Supreme Court, if in its judgment the point must be reached, must either proceed without the usual benefit of a lower-court opinion or else delay final disposition by remanding for that purpose.

A

The delegation doctrine is rooted in the principle of separation of powers that underlies the three-branch system of government established by the Constitution. As the Supreme Court stated in *Field v. Clark*, 143 U.S. 649, 692 (1892): "That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."

In the first century and a half of the nation's history, however, the Court uniformly held that challenged statutes did not unconstitutionally delegate legislative power. *See, e.g., Federal Radio Commission v. Nelson Brothers Bond & Mortgage*, 289 U.S. 266 (1933); *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *United States v. Grimaud*, 220 U.S. 506 (1911). As Chief Justice Taft explained in a passage that has become the classic exposition of the governing test, the separation-of-powers principle does not prevent the legislative branch from seeking the "assistance" of coordinate branches; "the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental coordination"; and so long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [exercise delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J. W. Hampton*, 276 U.S. at 406, 409.

In 1935, however, the Court used the delegation doctrine to strike down portions of the National Industrial Recovery Act of 1933. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). In these cases, the Court

concluded that Congress had failed to articulate a policy or set of standards which would serve to confine the discretion of the individuals exercising the delegated authority. *See Schechter*, 295 U.S. at 541–42; *Panama Refining*, 293 U.S. at 430. These two cases are the only cases in which the Court has declared a statute unconstitutional by reason of undue delegation.[8]

In the fifty years since *Schechter* was decided, the Court has consistently rejected delegation challenges.[9] Nominally, it has continued to apply the same test (as *Schechter* and *Panama Refining* themselves nominally applied the same test as *J. W. Hampton*), scrutinizing the challenged statutes for intelligible standards and statements of purpose which could provide guidance to the officials to whom authority was delegated. *See, e.g., Yakus v. United States*, 321 U.S. 414, 424–25 (1944); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165–66 (1941); *Opp*

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[8] The delegation doctrine was also discussed by the Court in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936). There the Court ruled that a provision in the Bituminous Coal Conservation Act of 1935 which authorized various majorities of coal producers and mine workers to set maximum hours and minimum wages for all miners was unconstitutional. *Id.* at 311. The Court denounced that provision as "legislative delegation in its most obnoxious form," but the Court's holding appears to rest primarily upon denial of substantive due process rights. *Id.*

[9] *See, e.g., United States v. Mazurie*, 419 U.S. 544, 556–57 (1975); *United States v. Sharpnack*, 355 U.S. 286, 297 (1958); *District of Columbia v. John R. Thompson Co.*, 346 U.S. 100, 110 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–44 (1950); *Lichter v. United States*, 334 U.S. 742, 774–75 (1948); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144–45 (1948); *Fahey v. Mallonee*, 332 U.S. 245, 250 (1947); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946); *Bowles v. Willingham*, 321 U.S. 503, 516 (1944); *Yakus v. United States*, 321 U.S. 414, 426 (1944); *National Broadcasting Co. v. United States*, 319 U.S. 190, 226 (1943); *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 165 (1941); *Opp Cotton Mills, Inc. v. Administrator*, 312 U.S. 126, 146 (1941); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940); *United States v. Rock Royal Co-op.*, 307 U.S. 533, 574 (1939); *Mulford v. Smith*, 307 U.S. 38, 48–49 (1939); *Currin v. Wallace*, 306 U.S. 1, 15 (1939).

Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 144 (1941); *United States v. Rock Royal Co-operative,* 307 U.S. 533, 574 (1939). Pragmatically, however, the Court's decisions display a much greater deference to Congress' power to delegate, motivated in part by concerns that, "[i]n an increasingly complex society Congress obviously could not perform its functions if it were obliged to find all the facts subsidiary to the basic conclusions which support the defined legislative policy." *Opp Cotton Mills,* 312 U.S. at 145. In *Yakus,* 321 U.S. at 425–26, the Court noted:

> It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework. . . .
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> . . . Only if we could say that there is an absence of standards for the guidance of the Administrator's action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose. . . .

The Supreme Court has endeavored to narrow the application of *Schechter* and *Panama Refining* by noting that those cases involved "delegation of a power to make federal crimes of acts that never had been such before and to devise novel rules of law in a field in which there had been no settled law or custom," *Fahey v. Mallonee,* 332 U.S. 245, 249 (1947), and that *Schechter* concerned a statute which delegated regulatory power to private individuals, *see Yakus,* 321 U.S. at 424. These attempts at narrowing the cases, and the Supreme Court's failure to use the delegation doctrine to strike down a statute in fifty years, have led some to conclude that the delegation doctrine is dead, or at least "moribund." *See National Cable Television Association v. United States,* 415 U.S.

336, 353 (1974) (Marshall, J., dissenting). The Court has continued to use the doctrine, however, in an interpretive mode, finding that statutory texts conferring powers on the Executive should be construed narrowly where broader construction might represent an unconstitutional delegation. *See, e.g., Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) (opinion of Stevens, J.); *National Cable Televisi n Association*, 415 U.S. at 342; *Zemel v. Rusk*, 381 U.S. 1, 17-18 (1965); *Kent v. Dulles*, 357 U.S. 116, 129 (1958). Such cases indicate that while the delegation doctrine may be moribund, it has not yet been officially interred by the Court.

Our analysis of the delegation challenged in the instant cases thus proceeds on the assumption that the delegation doctrine remains valid law, but that its scope must be determined on the basis of the deferential post-*Schechter* cases decided by the Supreme Court. We note, moreover, that the mode of analysis applied by the Supreme Court in this field relies substantially upon factual comparison of the delegation under challenge with delegations previously adjudicated. *See, e.g., Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144-46 (1948); *American Power & Light Co. v. SEC*, 329 U.S. 90, 104-05 (1946); *Opp Cotton Mills*, 312 U.S. at 146; *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940). With that teaching firmly in mind, we turn to the arguments raised by plaintiffs.

B

Plaintiffs advance a number of arguments that attempt to establish what might be termed *per se* nondelegability of the powers at issue here—as opposed to arguments, which we will discuss in the following section, going to deficiency in the standards governing the delegation. Plaintiffs begin by arguing that the type of authority delegated by the Act is "so central to the legislative function" that it may not be delegated. They cite the dictum of Chief Justice Marshall in support of the notion that

there exist certain nondelegable "core functions" of Congress:

> The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions, to fill up the details.

Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825). The legislative power over appropriations conferred by Article I, section 8, clause 1 and Article I, section 9, clause 7 is said to constitute such a nondelegable "core function," particularly where the delegated authority could affect the functioning of a broad range of federal programs and, plaintiffs allege, would allow "unelected bureaucrats" to "override" portions of duly enacted appropriations laws.

We reject this "core functions" argument for several reasons. First, plaintiffs cite no case in which the Supreme Court has held *any* legislative power, much less that over appropriations, to be nondelegable due to its "core function" status. Indeed, in *Lichter v. United States,* 334 U.S. 742, 778–79 (1948), the Court stated flatly that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Second, judicial adoption of a "core functions" analysis would be effectively standardless. No constitutional provision distinguishes between "core" and "noncore" legislative functions, so that the line would necessarily have to be drawn on the basis of the court's own perceptions of the relative importance of various legislative functions. Finally, if there were any nondelegable "core functions," there is no reason to believe that appropriations functions would be among them. The appropriations power is not functionally distinguishable from other powers successfully delegated by Congress,[10] and is par-

[10] The Supreme Court has, of course, frequently upheld delegation of regulatory authority under the commerce clause power. Delegations

Continued

ticularly akin to the taxing power, which is similarly derived from Article I, section 8, clause 1 of the Constitution. In upholding a statute which delegated the latter power by permitting the President to determine whether to increase duties on certain articles in foreign commerce, the Supreme Court said:

> It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise.

J. W. Hampton, 276 U.S. at 409; *see also Field v. Clark*, 143 U.S. at 680-94.

The second contention that may be viewed as going to *per se* nondelegability of the authority conferred by the Act (though it is related to the issue of inadequate stand-

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of authority conferred by many other constitutional provisions also have been sustained, however. It has been held, for example, that Congress properly delegated power over immigration, *see INS v. Chadha*, 462 U.S. 919, 953-54 n.16 (1983); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542-44 (1950); the power to determine what constitutes a federal crime, *see United States v. Sharpnack*, 355 U.S. 286 (1958); *United States v. Grimaud*, 220 U.S. 506 (1911); and the power to legislate for the District of Columbia, even though the Constitution describes that power as "exclusive" in Congress. *See District of Columbia v. John R. Thompson Co.*, 346 U.S. 100 (1953). Moreover, in *Lichter*, 334 U.S. at 778-79, the Court stated that Congress' power to delegate "is especially significant in connection with constitutional war powers."

ards) concerns the breadth of the power allocated to administrative officials, which plaintiffs assert is constitutionally excessive. There is no doubt that the Act delegates broad authority, but delegation of similarly broad authority has been upheld in past cases. In *Yakus*, for example, the Court upheld a statute which delegated to an unelected Price Administrator the power "to promulgate regulations fixing prices of commodities." 321 U.S. at 420. In *Bowles v. Willingham*, 321 U.S. 503, 512, 514–15 (1944), it upheld the delegation of power to institute rent controls on real property anywhere in the nation under specified circumstances. Finally, in *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 745, 763 (D.D.C. 1971), a three-judge district court upheld a delegation of authority to the President "to issue such orders and regulations as he deems appropriate to stabilize prices, rents, wages and salaries." The authority conferred by the present Act, which permits administrators to affect spending levels for a specified range of federal programs, and only to a certain degree, seems to us no broader than these delegations that have been upheld. We think, in any event, that the ultimate judgment regarding the constitutionality of a delegation must be made not on the basis of the scope of the power alone, but on the basis of its scope *plus* the specificity of the standards governing its exercise. When the scope increases to immense proportions (as in *Schechter*) the standards must be correspondingly more precise. As we shall see, the standards governing the power here are much more specific than in the cases just described.

Nor is it the law, as plaintiffs assert, that a broad delegation such as this must be supported by some rigorous "principle of necessity" which is allegedly not met here because Congress has exercised sole power over appropriations in the past and presumably could continue to do so. To be sure, in delegation cases the Supreme Court has occasionally recognized the "necessity" for a delegation. *See, e.g., Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904).

It is doubtful, however, that the word "necessity" in that context, any more than the word "necessary" in the "necessary and proper" clause of the Constitution, refers to an "absolute physical necessity." *See McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 413–15 (1819). Rather, necessity refers to a strong utility and convenience, which can certainly be considered to exist here. In any case, while "necessity" has been noted by the Court in upholding a delegation, "lack of necessity" has never been invoked to strike one down. The same response may be made to plaintiffs' argument based upon what they consider the long (six-year) duration of the present broad delegation: while extremely limited duration has been invoked as one of the elements sustaining a delegation, lengthy duration has never been held to render one void. The delegations upheld in *J.W. Hampton,* 276 U.S. at 394, and *Field v. Clark,* 143 U.S. at 649, for example, were for indefinite terms.

Finally, plaintiffs argue that the present delegation is *per se* invalid because it allows administrators to "nullify" or "override" laws. Again we disagree. The Supreme Court previously has upheld delegations which permit officials to determine when, if ever, a law should take effect. *See, e.g., Rock Royal Co-operative,* 307 U.S. at 577–78; *Currin v. Wallace,* 306 U.S. 1, 15–16 (1939); *Field v. Clark,* 143 U.S. at 693; *The Cargo of the Brig Aurora v. United States,* 11 U.S. (7 Cranch) 382, 388 (1812). In such cases, the Court classifies Congress' action as legislating in contingency. The instant Act is no more than a form of such contingent legislation. Throughout the Act, Congress has stipulated that the full effectiveness of all appropriations legislation enacted for fiscal years 1986 to 1991 will be contingent upon the administrative determination whether all appropriated funds, when measured against revenues, result in a budget deficit in excess of required target figures. Viewed in this context, the authority delegated by the Act does not differ in kind from that approved in prior cases.

C

We come, then, to what is the plaintiffs' principal argument on the excessive delegation point: that because of the lack of standards and the inherent imprecision of the duties conferred upon the administrators, the Act fails adequately to confine the exercise of administrative discretion. The search for adequate standards to restrict administrative discretion lies at the heart of every delegation challenge. The essential inquiry is whether the specified guidance "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus*, 321 U.S. at 425.

Our consideration of this objection requires a careful review of the statute. The Act begins by establishing a "maximum deficit amount" for each fiscal year between 1986 and 1991. Act § 201(a)(1). It then requires the Directors of the OMB and the CBO to estimate the anticipated "budget base levels of total revenues and budget outlays" for a given fiscal year, to determine whether the projected deficit for that year will exceed the maximum deficit amount for that year by more than a specified amount, and to estimate the rate of real economic growth that will occur during that fiscal year, as a whole and by quarters, and the rate of real economic growth that occurred during each of the last two quarters of the preceding fiscal year. *Id.* § 251(a)(1). The Directors are then jointly to report their conclusions to the Comptroller General. *Id.* § 251(a)(2).[11]

The Comptroller General is instructed to "review and consider the report" and, "with due regard for the data,

[11] These conclusions all contribute to the calculation of whether the estimated deficit for a given fiscal year exceeds the maximum deficit amount by more than the amount specified in § 251(a)(1)(B) of the Act. Only if it does so will the Directors recommend spending reductions. *See* Act § 251(a)(2). Plaintiffs do not challenge the procedure by which the administrators are to allocate the spending reductions necessary to reduce the deficit excess.

assumptions, and methodologies used in reaching the conclusions set forth therein," issue his own report making the same type of estimates and determinations contained in the Directors' report. § 251(b)(1)-(2). The Comptroller General's report is to "be based on the estimates, determinations, and specifications of the Directors and shall utilize the budget base, criteria, and guidelines set forth" in specified sections of the Act. *Id.* § 251(b)(1). The report must "fully explain" any differences between its determinations and those included in the report of the Directors. *Id.* § 251(b)(2).[12]

In considering whether this scheme contains constitutionally adequate legislated standards, we first observe that it does set forth specific assumptions that are to be used in calculating the budget base. *See* Act § 251(a)(6). The administrative officials are directed to assume, with some specified exceptions, "the continuation of current law in the case of revenues and spending authority," *id.* § 251(a)(6)(A), (C) [13] and, in all areas to which the preceding assumption is inapplicable, "appropriations equal to the prior year's appropriations except to the extent that annual appropriations or continuing appropriations for the entire fiscal year have been enacted." *Id.* § 251(a)(6)(B). They must assume that "expiring provisions

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[12] In fiscal years 1987-1991, the Directors and the Comptroller General are required to submit revised reports under § 251(c) of the Act. We disregard that refinement for present purposes, since the types of determinations to be made in those revised reports do not differ from those required to be made in the initial reports.

[13] "Spending authority" is defined by reference to the Congressional Budget Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified in relevant part as amended at 2 U.S.C. §§ 631-661 (1982)). The relevant provision states that "spending authority" means temporary or permanent authority related to government contractual obligations, the incurring of indebtedness, and the making of certain payments, such as for loans and grants, if such budget authority is "not provided for in advance by appropriations Acts." 2 U.S.C. § 651(c)(2). "Spending authority" does not include authority "to insure or guarantee the repayment of indebtedness incurred by another person or government." *Id.* § 651(c).

of law providing revenues and spending authority . . . do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates." *Id.* § 251(a)(6)(C). Additionally, they must assume that "Federal pay adjustments for statutory pay systems" will be as recommended by the President and will not result in pay reductions and that Medicare spending levels for inpatient hospital services will be based upon specified regulations. *Id.* § 251(a)(6)(D). Finally, certain spending deferrals proposed by the President are not to be included in the calculation. *Id.* All of these directions relate to the required calculation of "budget base levels of total revenues and total budget outlays" for a fiscal year.

The Act provides further guidance and limitation by way of definition. The "real economic growth" to be calculated is defined as "the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions." Act § 257(6). "Budget outlays" and "budget authority" are defined by reference to provisions of the Congressional Budget and Impoundment Control Act of 1974.[14] "Deficit" is defined as "the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year." *Id.* §§ 257(4), 201(a)(1). Moreover, the latter definition provides certain criteria for calculation of the deficit. *See id.* § 201(a)(1).[15]

[14] Pub. L. No. 93-344, 88 Stat. 297 (codified in relevant part as amended at 2 U.S.C. §§ 621-688 (1982)). "Budget outlays" means, "with respect to any fiscal year, expenditures and net lending of funds under budget authority during such year." 2 U.S.C. § 622(1). "Budget authority" means "authority provided by law to enter into obligations which will result in immediate or future outlays involving Government funds, except that such term does not include authority to insure or guarantee the repayment of indebtedness incurred by another person or government." *Id.* § 622(2).

[15] These criteria relate, *inter alia,* to treatment of Social Security funds and the "receipts, revenues, disbursements, budget authority, and outlays of each off-budget Federal entity." Act § 201(a)(1).

These required assumptions and definitions are given additional meaning by reference to years of administrative and congressional experience in making similar economic projections and calculations under the Congressional Budget Act of 1974.[16] The present Act's references to the 1974 Act and to Department of Commerce regulations manifest Congress' intent that past practice should inform the administrators' calculations. The standards set by this Act thus "derive much meaningful content from the purpose of the Act, its factual background and the statutory context in which they appear." *American Power & Light Co.,* 329 U.S. at 104; *see also Lichter,* 334 U.S. at 785 ("Standards prescribed by Congress are to be read in the light of the conditions to which they are to be applied."); *Amalgamated Meat Cutters,* 337 F.Supp. at 748 (standards set by statute are defined in part by consideration of experience under previous wage and price stabilization statutes). Additionally, we note that the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations. Here, as in *Sunshine Anthracite Coal Co.,* 310 U.S. at 398, "in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act."

We are of the clear view that the totality of the Act's standards, definitions, context, and reference to past administrative practice provides an adequate "intelligible principle" to guide and confine administrative decisionmaking. It is unquestionably true, as plaintiffs point out, that in making the assessments of current facts and the predictions of future facts that the statute requires, a

[16] Under the 1974 Act, the CBO is required to perform a number of economic calculations. For example, near the beginning of each fiscal year, it must issue a report projecting for five fiscal years the total new budget authority and total budget outlays for each fiscal year in that period, revenues to be received in each fiscal year, the anticipated surplus or deficit, and the amount of "tax expenditures." 2 U.S.C. § 639(c) (1982).

good deal of judgment is involved, and different individuals faithfully seeking to follow Congress' instructions may reach different results. Nevertheless, the discretion involved in assessing current facts and predicting future ones is inseparable from administration of the law, and it is one of the reasons we consider it important to elect our Chief Executive. If the facts and predictions here are difficult to ascertain, they are no more so than many others committed to the charge of administrative officials, such as the complex economic calculations required of the agencies that determine the discount rate, the consumer price index, and the gross national product. What is significant about this case, and what distinguishes it from many other cases in which delegation has been upheld, is that the *only* discretion conferred is in the ascertainment of facts and the prediction of facts.[17] The Comptroller General is not made responsible for a single *policy* judgment as to, for example, what is a "fair price," *see Yakus*, 321 U.S. at 414, or when it would be "appropriate" to freeze wages and prices, *see Amalgamated Meat Cutters*, 337 F. Supp. at 737, or wherein lies the "public interest," *see National Broadcasting Co. v. United States*, 319 U.S. 190 (1943). Compared with the cases upholding administrative resolution of such issues, the present delegation is remote from legislative abdication. Congress "is not confined to that method of executing its policy which involves the least possible delegation of discretion to administrative officials." *Yakus*, 321 U.S. at 425–26.

D

Finally, we consider plaintiffs' argument that the delegation is unlawful because of the preclusion of judicial

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[17] Of course the Comptroller General must interpret the law in applying the provisions of the Act, a point that will be relevant to the separation-of-powers discussion in Part IV of this opinion. Whether or not that power can appropriately be considered a "discretion," it is necessarily possessed by all officers charged with administration of the law and therefore cannot possibly cause problems of unconstitutional delegation.

review. Section 274(h) of the Act provides that "[t]he economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." This is of course not a total preclusion of judicial review with respect to all action taken under the Act. It does not restrict the bringing of constitutional challenges; indeed, in subsection 274(a), the Act endeavors to facilitate this type of judicial review by broadly designating those who may bring such suits. In addition, subsection 274(g) preserves the rights guaranteed by other laws; thus, there is nothing to prevent a court from determining whether the operation of the Act improperly infringes upon such rights. Moreover, by its terms, subsection 274(h) would not prevent a court from determining whether the Comptroller General failed to make one of the assumptions required by subsection 251(a)(6). Additionally, since the judicial review preclusion extends only to determination of "base levels of total revenues and total budget outlays," a court presumably could determine whether the Comptroller General had complied with the deficit calculation criteria contained in subsection 201(a)(1). Nor are courts precluded from considering whether any allocation of spending reductions is made pursuant to statutory standards. Finally, the Act expressly provides for review of the presidential sequestration orders to determine their compliance with statutory requirements. *See* Act § 274(d).

The Act does insulate, however, those exercises of judgment by the Comptroller General that the plaintiffs challenge and that we have approved above. Plaintiffs argue that a condition of the validity of, if not all delegations, at least a delegation as broad as that here at issue, is the availability of judicial review of its exercise. We do not agree. To be sure, the Supreme Court has sometimes alluded to the availability of judicial review in its catalogue of factors such as "necessity" and "limited duration," dis-

cussed above, validating the delegation. In *Opp Cotton Mills,* for example, it said that

> where . . . the standards set up for the guidance of the administrative agency, the procedure which it is directed to follow and the record of its action which is required by statute to be kept or which is in fact preserved, are such that Congress, *the courts* and the public can ascertain whether the agency has conformed to the standards which Congress has prescribed, there is no failure of performance of the legislative function.

312 U.S. at 144 (emphasis added). And more recently, in *INS v. Chadha,* it noted in dictum that the exercise of delegated authority "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953–54 n.16.

These allusions cannot be thought to establish the principle that judicial review is essential to sustain a delegation, since the exercise of many validly delegated authorities is statutorily insulated from judicial review. *See, e.g., Southern Railway v. Seaboard Allied Milling Corp.,* 442 U.S. 449, 454–64 (1979) (construing provision of Interstate Commerce Act); *Thompson v. Clark,* 741 F. 2d 401, 404–05 (D.C. Cir. 1984) (construing provision of Regulatory Flexibility Act). Even the more limited principle that judicial review can "save" a delegation that would otherwise be invalid is questionable, since if the requisite minimum standards have in fact not been established by Congress, permitting them to be invented by the courts rather than by the administrator is *no less* a delegation of political power, and arguably a worse one, since it is to a nonpolitical branch, and a branch even less subject to congressional controls. In any event, since we do not regard the present delegation as close to the line of invalidity, and since judicial review of almost all of the administrative determinations remains available, we find that insulating from judicial review the "economic data, assumptions,

and methodologies used . . . in computing the base levels of total revenues and total budget outlays" provides no basis for finding the delegation invalid.

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In sum, our review of the aggregate effect of the factors identified by the plaintiffs leads us to conclude that delegation made by the Act passes constitutional muster. Apart from the technicalities of the matter, the realities produce the same conclusion. It seems to us not true, as plaintiffs have asserted, that Congress has declined to make the "hard political choices." To the contrary, it has decided to impose the severe constriction of federal spending necessary to produce a balanced budget by fiscal year 1991, it has established an intricate administrative mechanism to address that goal, and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much. *See generally* Act §§ 251(a)(3), 255, 256. All that has been left to administrative discretion is the estimation of the aggregate amount of reductions that will be necessary, in light of predicted revenues and expenditures, and we believe that the Act contains standards adequately confining administrative discretion in making that estimation. While this is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself. Through specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function. It "has defined the circumstances when its announced policy is to be declared operative and the method by which it is to be effectuated. Those steps constitute the performance of the legislative function in the constitutional sense." *Bowles v. Willingham*, 321 U.S.

at 514. Accordingly, plaintiffs' delegation challenge is rejected.

IV

We turn to the next major objection to the Act's automatic deficit reduction process, pressed in particular by the United States: that the role of the Comptroller General in that process is invalid because he does not possess the constitutional qualifications to perform it.[18] The objection takes various forms, but the only one we find it necessary to address is the contention that the Act confers upon the Comptroller General powers which are executive in nature, and which therefore cannot be conferred upon an officer who lacks the degree of independence from Congress that their exercise constitutionally requires. Specifically, the government objects to the fact that the Comptroller General, while appointed by the President with the advice and consent of the Senate, is removable not only by impeachment (as are all officers of the United States) but also by joint resolution of Congress for specified causes, including inefficiency and neglect of duty.[19]

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[18] It is argued by some of the plaintiffs that the Act in reality confers power not upon the Comptroller General but rather upon the Directors of the OMB and the CBO, whose joint report the Comptroller General assertedly will "rubber-stamp." We find that assertion unconvincing, and thus direct our attention to the separation-of-powers concerns raised by the Comptroller General's formal powers under the Act. Of course, if it were true and relevant that the exercise of those powers would effectively be dictated by the Directors, our conclusion that the Act unconstitutionally vests executive powers in an official removable in a manner inconsistent with the exercise of such powers would be *a fortiori* correct, because the Director of the CBO is removable by resolution of either House. *See* 2 U.S.C. §601(a)(4) (1982).

[19] The provision of law governing the Comptroller General's removal reads as follows:

> A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by—
>
> (A) impeachment; or

Continued

A

Three threshold objections are raised to our consideration of this issue as a basis for invalidating the automatic deficit reduction process. First, intervenors argue that, until removal is attempted, the issue of the effect of the Comptroller General's removability upon his powers is not ripe for adjudication. This argument is flatly contradicted by the decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). There the Supreme Court adjudicated (and in fact found meritorious) the claim that bankruptcy judges who were appointed to fixed fourteen-year terms, subject to removal for cause by the judicial council of the circuit in which they served, and whose salaries were not immune from possible diminution, could not constitutionally exercise certain of the powers granted them by the Bankruptcy Act of 1978—notwithstanding the fact that no removal or salary diminution had been attempted. 458 U.S. at 60–61, 87 (plurality opinion).

Intervenors seek to distinguish *Northern Pipeline* on the asserted ground that the Court focused its attention on what they describe as the constitutionally defective tenure provision that had already been exercised (*viz.*, under their analysis, the provision appointing bankruptcy judges to a fixed term), rather than the ones that had not yet been exercised (*viz.*, the provisions permitting removal during the fixed term and reduction of salary). As a factual matter, the assertion is not true. The *Northern Pipeline* Court focused no more of its attention on the fixed-term provision than on the removal-for-cause provi-

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(B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—

(i) permanent disability;

(ii) inefficiency;

(iii) neglect of duty;

(iv) malfeasance; or

(v) a felony or conduct involving moral turpitude.

31 U.S.C. § 703(e)(1)(1982).

sion or the absence of statutory protection against diminution in salary; it simply noted all three problems, drawing no distinction among them on "ripeness" or any other grounds. *Northern Pipeline*, 458 U.S. at 60–61. Moreover, the very notion that the constitutional vice in *Northern Pipeline* had been "exercised," while in the present case the asserted constitutional vice has not been, strikes us as little more than semantic legerdemain. In the same sense in which the bankruptcy judges had already been appointed to positions with a fixed term, the Comptroller General has already been appointed to a position subject to congressional removal; and in the same sense that the congressional removal provision has not yet been applied in this case, neither had the provision requiring judges to step down after fourteen years in *Northern Pipeline*. It is true, of course, that the expiration of fourteen years was certain to occur while in the present case congressional removal is not. But that is quite irrelevant to whether the two provisions differ in their immediate impact, so that one is more "ripe" for review than the other. The immediate impact in *Northern Pipeline* came not from the certainty of expiration of fourteen years, but from the bankruptcy judge's awareness of the possibility of non-reappointment. It is his presumed desire to avoid that possibility by pleasing the appointing power, just as in the present case it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems.[20]

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[20] Intervenors also seek to find support for their ripeness argument in *Clark v. Valeo*, 559 F.2d 642 (D.C. Cir.) (en banc) (per curiam), *aff'd mem.*, 431 U.S. 950 (1977), and *Muller Optical Co. v. EEOC*, 743 F.2d 380 (6th Cir. 1984). It is not there. *Clark*, to be sure, rejected a challenge to a legislative veto provision as unripe because the provision had not been exercised. But *Clark* involved a naked attack upon the provision itself and not, like the present case, a challenge to present use of the statutory powers to which the provision was attached. And

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The second threshold argument, made by the Senate, is that, since the manner of removal that the Comptroller General's tenure statute embodies [21] is functionally the same as new legislation, there is no more reason for us to consider whether the existence of that tenure statute invalidates the present Act than there would be to consider, in the absence of such a statute, whether the possibility of Congress' passing a law removing the Comptroller General would invalidate the Act. We disagree. Insofar as justiciability and ripeness are concerned, the mere possibility that Congress might seek to remove an officer is no more comparable to its formal assertion (by legislation) of the power to do so, than is the mere possibility of an agency's punishing certain conduct comparable to its formal assertion (by rule) of the power to do so. *Cf. Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). It is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance. And it is this, in turn, that consti-

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Muller, which *did* address a challenge comparable to the present case, implicitly rejects rather than supports intervenors' ripeness argument, deciding *on the merits* a claim that the existence of an unexercised legislative veto provision in a statute rendered actions taken under that statute unconstitutional. *Muller*, 743 F.2d at 388. *See also Alaska Airlines, Inc. v. Donovan*, 766 F.2d 1550 (D.C. Cir. 1985) (holding on the merits that the existence of an unexercised legislative veto provision in a statute would render invalid actions taken under the statute unless the legislative veto provision were severable from the portion of the statute pursuant to which the challenged actions were taken), *petition for cert. filed*, 54 U.S.L.W. 3394 (U.S. Nov. 27, 1985) (No 85-920).

[21] The statute provides for removal by joint resolution, which requires either presidential approval or passage by a two-thirds vote of both Houses of Congress over a presidential veto. In assessing the compatibility of such a provision with the constitutional doctine of separation of powers, we think it most appropriate to focus our attention on the latter possibility—that Congress could remove the Comptroller General despite presidential opposition—and we therefore refer to the provision as authorizing congressional removal.

tutes the asserted evil of which the plaintiffs complain. The logic of the Comptroller General's argument leads to the conclusion that a tenure statute providing for removal of a judge exercising Article III powers by joint resolution could similarly not be challenged, a prospect we are not prepared to entertain.

Intervenors' last threshold argument is that, even if the powers granted to the Comptroller General under the Act cannot be conferred upon an officer removable by Congress, that conclusion does not necessarily invalidate the Act, but rather requires us to choose *which* of the two incompatible provisions (the powers in the Act or the removal authority) should be set aside. That decision, they assert, should turn primarily upon our estimation of which of the two provisions Congress would have wished to survive—which they maintain is the Act.

Intervenors do not refer us to, nor are we aware of, any case in which a court confronted with separate statutes, constitutionally incompatible in combination, has even considering choosing which of the two to invalidate, much less resolved that choice as intervenors suggest. To the contrary, as the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate, the courts set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff. *See Springer v. Government of the Philippine Islands,* 277 U.S. 189 (1928) (removing from office, in *quo warranto* proceeding brought by Philippine Governor-General, officials exercising executive power but appointed by officers of Philippine legislature); *Myers v. United States,* 272 U.S. 52 (1926) (setting aside tenure-of-office statute that was the basis of postmaster's claim of unlawful presidential removal). Indeed, the Supreme Court has taken that approach even when the incompatible authorization and removal (or appointment) provisions are contained within *the same* enactment. *See Northern Pipeline,* 458 U.S. at 50 (setting aside exercise of adjudicatory authority over

plaintiff by bankruptcy judge who lacked Article III life tenure); *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam) (setting aside Federal Election Campaign Act provisions granting authority over plaintiffs to officials appointed in a manner incompatible with the exercise of such authority).

Even if we were to agree, however, that when confronted with two separate provisions that cannot both be constitutionally sustained, we are free to choose between them, and are to make our choice on the basis of presumed congressional intent, we would conclude that in the present case it is the grant of powers under the Act that would have to fall. As the brief of Intervenor Speaker and Bipartisan Leadership Group of the House meticulously details, the grant of authority to the Comptroller General was a carefully considered protection against what the House conceived to be the pro-executive bias of the OMB. It is doubtful that the automatic deficit reduction process would have passed without such protection, and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself—much less if he were removable (as validation of his functions under this legislation might constitutionally require, a point we do not reach) at the discretion of the President, like the Director of the OMB himself.

A congressional intent that it is the Comptroller General's powers under this Act, rather than his manner of removal, that should yield if both cannot coexist is also strongly suggested by the fallback deficit reduction process specifically established by the Act to take effect if the automatic deficit reduction process is declared constitutionally infirm—especially since it is clear that one of the grounds of possible infirmity specifically brought to Congress' attention by the executive branch was the partici-

pation of the Comptroller General.[22] By reason of that fallback process, we might add, setting aside the grant of powers to the Comptroller General would result in a state of affairs that Congress unquestionably was willing to accept, whereas congressional acceptance of an automatic deficit reduction process administered by a Comptroller General unremovable by Congress (and perhaps removable at will by the President) is purely speculative. Indeed, even apart from the fallback process a decision setting aside the grant of powers under this Act rather than the separate statutory provision for the Comptroller General's removal would run much less risk of frustrating congressional intent. We have no idea how many powers of the Comptroller General, conferred upon him by other statutes, would not have been conferred if he were not subject to congressional removal.

We conclude, therefore, that the question whether the powers conferred upon the Comptroller General by the Act are constitutionally incompatible with his removability from office by Congress is ripe for our consideration; and that an affirmative answer requires invalidation of those powers. We turn to the merits of this issue.

B

The only portions of the Constitution explicitly addressing the power to remove officers of the United States [23]

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[22] *See Statement on Signing H.J. Res. 372 Into Law,* 21 Weekly Comp. Pres. Doc. 1490–91 (Dec. 12, 1985) ("[E]xecutive functions may only be performed by officers in the executive branch. The . . . Comptroller General [is an] agent[ ] of Congress, not [an] officer[ ] in the executive branch. . . . My administration alerted Congress to [this] . . . problem[ ] throughout the legislative process in an effort to achieve a bill free of constitutionally suspect provisions. . . . [We] were unsuccessful in this goal. . . .").

[23] "Officers" are to be distinguished from "employees," *see Buckley v. Valeo,* 424 U.S. at 126 & n.162, as to whom the congressional power to restrict or impose removal may be quite different. The distinction is not relevant to the present case, however, since it is conceded that the Comptroller General is an officer. There may also be a difference, at

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are the impeachment clauses, which provide that "The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4, and that the House of Representatives shall bring, and the Senate try, the impeachment, Art. I, § 2, cl. 5; Art. I, § 3, cl. 6. The appointments clause of the Constitution, which it is universally agreed has some bearing upon removal powers, reads as follows:

> . . . [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

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least insofar as Congress' ability to restrict the President's removal power is concerned, between those officers included within the meaning of the phrase "inferior Officers" in the appointments clause of the Constitution, whose manner of appointment that clause permits to be controlled to some degree by Congress (*viz.*, to be vested "in the President alone, in the Courts of Law, or in the Heads of Departments," Art. II, § 2, cl. 2); and other officers, whom the appointments clause requires to be appointed by the President with the advice and consent of the Senate, *id. See, e.g., Myers*, 272 U.S. at 158-64; *United States v. Perkins*, 116 U.S. 483, 484-85 (1886) (dictum). That distinction also is not pertinent here, since no one contends, and it seems to us not seriously maintainable, that the Comptroller General is an "inferior Officer." Finally, there may be a distinction between "officers of the United States" and "officers of Congress," *see Buckley v. Valeo*, 424 U.S. at 127-28. Although it is not conceded that the Comptroller General comes within the former category (the government vigorously asserts the contrary), we find it unnecessary to decide the question, since if the Comptroller General is not an officer of the United States he is *a fortiori* unable to exercise the executive powers we find him unable to exercise on narrower grounds. Our analysis assumes, in other words, the more validating characterization of the office.

Art. II, § 2, cl. 2.

Since the early days of the Republic it has not been doubted that the Constitution implicitly confers upon the President power to remove civil officers whom he appoints, at least those who exercise executive powers. In what has come to be known in the legal literature as the "Decision of 1789," the First Congress, after heated debate, deleted from a proposed bill creating the Department of Foreign Affairs language which provided that the Secretary of Foreign Affairs was "to be removable from office by the President." The reason urged by the proponents of the deletion was that the original text implied the absence of a constitutionally conferred power of the President to effect the removal. *See Myers,* 272 U.S. at 111–36.

The extent to which the implicit presidential removal power extends beyond officers exercising executive powers, however, the extent to which it can be restricted by legislation, and the extent to which it can be conferred by legislation upon the Congress itself, have been the subject of Supreme Court pronouncements that are conflicting in their reasoning, if not in their results. *See generally* Burkoff, *Appointment and Removal under the Federal Constitution: The Impact of Buckley v. Valeo,* 22 Wayne L. Rev. 1335 (1976); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies,* 21 Cornell L.Q. 215 (1936). The cases are few enough that their holdings and their principal rationales may be readily summarized.

In *In re Hennen,* 38 U.S. (13 Pet.) 230 (1839), the Court held that a district court clerk, who had been appointed by a district court judge pursuant to that provision of the Constitution authorizing Congress to vest the appointment of "inferior Officers . . . in the Courts of Law," could also be removed by a district court judge. The Court said that "[i]n the absence of all constitutional provision or statutory regulation, it would seem to be a scund and

necessary rule, to consider the power of removal as incident to the power of appointment." *Id.* at 259.

In *United States v. Perkins,* 116 U.S. 483 (1886), the Court upheld an award of back pay to a cadet-engineer in the Navy, who had been appointed by the Secretary of the Navy and was dismissed by him in disregard of a statutory provision prohibiting dismissal of any naval officer in peacetime except by court martial. The Court quoted and approved the opinion of the Court of Claims stating that, regardless of what the situation might be with regard to officers appointed by the President by and with the advice and consent of the Senate under the self-operative provision of the Constitution,

> 'when Congress, by law, vests the appointment of inferior officers in the heads of Departments it may limit and restrict the power of removal as it deems best for the public interest. The constitutional authority in Congress to thus vest the appointment implies authority to limit, restrict, and regulate the removal by such laws as Congress may enact in relation to the officers so appointed.'

Id. at 485.

In *Shurtleff v. United States,* 189 U.S. 311 (1903), the Court held that a statute which provided that a particular Customs Department official "may be removed from office at any time by the President for inefficiency, neglect of duty, or malfeasance in office" did not prevent presidential removal for other reasons, since such a limitation would have to be stated in "very clear and explicit language," *id.* at 315. The Court did not confront, therefore, the issue of whether such a limitation would be constitutional.

In *Myers v. United States*, 272 U.S. 52 (1926), the Court finally dealt with the constitutionality of a statutory provision giving Congress a role in the removal process. The plaintiff was a postmaster, appointed by the President with the advice and consent of the Senate, for a four-year term; he was dismissed by the President despite a tenure-of-office act requiring advice and consent of the Senate

for his removal. The Court found the limitation unconstitutional in a 71-page opinion by Chief Justice Taft exhaustively examining the historical record bearing upon the meaning of the applicable constitutional texts. The nub of the analysis is that, as the Decision of 1789 in the Court's view established, and as *In re Hennen* had held, "the power of removal [is] incident to the power of appointment," 38 U.S. (13 Pet.) at 259. The Constitution gives Congress no authority to limit that removal power, except, implicitly, in the provision authorizing Congress to provide for the appointment of inferior officers by means other than the constitutionally prescribed method of presidential appointment with Senate consent. At least where it exercises that authority in such fashion as to vest appointment in the head of a department, it "may prescribe incidental regulations controlling and restricting the [appointing officer] in the exercise of the power of removal." 272 U.S. at 161. Even in the latter situation, the Court added, for Congress to "draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power . . . would be . . . to infringe the constitutional principle of the separation of governmental powers." *Id.* The opinion clearly regarded its holding as applicable to officers whose functions include "duties of a quasi-judicial character," *id.* at 135, including specifically the commissioners of the Interstate Commerce Commission, *see id.* at 171–72.

The next case, decided nine years later, warrants more extended attention, since it is the last major discussion by the Supreme Court of the constitutional authority of Congress over power of removal. *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), was a suit for back pay by a commissioner of the Federal Trade Commission whom President Roosevelt had removed without cause. The Federal Trade Commission Act provided that commissioners "may be removed by the President for inefficiency, neglect of duty, or malfeasance in office." The Court's opinion, by Justice Sutherland, first found that

this language, unlike the virtually identical language involved in *Shurtleff*, did bar removal for other causes, distinguishing the earlier case on the basis that the office there involved had no term of appointment, whereas Federal Trade Commissioners were limited to a term of seven years. *Humphrey's Executor*, 295 U.S. at 619–26. Then, in six pages addressing the constitutional issue—two of which were spent discussing why the facts of *Myers* were distinguishable—the opinion swept away much of the reasoning of *Myers* (precisely how much is one of the issues before us) and simultaneously revolutionized separation-of-powers analysis. The Court said that the holding of *Myers* extended only to "purely executive officers," and that the constitutional prohibition it expressed did not apply to an officer like the Federal Trade Commissioner, who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President," but acts only "in the discharge and effectuation of . . . quasi-legislative [24] or quasi-judicial powers, or as an [officer of an] agency of the legislative or judicial departments of the government." 295 U.S. at 628.[25] As to the latter, it said, "illimitable

[24] It is noteworthy, though generally not noted, that the "quasi-legislative" powers referred to in *Humphrey's Executor* were not substantive rulemaking powers, which the Federal Trade Commission itself did not assert it possessed until 1962, *see National Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974), but rather the responsibility to conduct investigations for the purpose of recommending legislation to Congress. *See* 295 U.S. at 621, 628. Though the holding of *Humphrey's Executor* is necessarily limited to this sort of function, it is generally assumed (though without any Supreme Court holding to sustain the point) that rulemaking is a "quasi-legislative activity" for purposes of the rule of *Humphrey's Executor*. *See, e.g., INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

[25] The Court did note that the President was authorized to direct the Federal Trade Commission to investigate and report alleged antitrust violations, but described that activity to be an "executive function—as distinguished from executive power in the constitutional sense—[exercised] in the discharge and effectuation of [the Federal

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power of removal is not possessed by the President," and Congress may "fix the period during which [the officer] shall continue in office, and . . . forbid . . . removal except for cause in the meantime." *Id.* at 629. This was said to be required by the doctrine of separation of powers, since "sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there," and since the "coercive influence [of unlimited presidential power of removal] threatens the independence of a commission, which is not only wholly disconnected from the executive department, but which . . . was created by Congress as a means of carrying into operation legislative and judicial powers, and as an agency of the legislative and judicial departments." *Id.* at 630.

The last Supreme Court decision involving the removal power was handed down almost three decades ago. *Wiener v. United States*, 357 U.S. 349 (1958), was another back-pay suit, by a commissioner of the War Claims Commission who had been removed by President Eisenhower without cause. It was uncontested that the Commission exercised only "quasi-judicial" functions, and the point at issue was whether Congress had prohibited presidential removal without cause. Despite the absence of any explicit prohibition, the Court found that

> [i]f, as one must take for granted, the War Claims Act precluded the President from influencing the Commission in passing on a particular claim, *a fortiori* must it be inferred that Congress did not wish to have hang over the Commission the Damocles' sword of removal by the President for no reason other than that he preferred to have on that Commission men of his own choosing.

Trade Commission's] quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government." *Humphrey's Executor*, 295 U.S. at 628 & n.*. In this opinion, we are careful to direct our attention to the question whether the power that the Comptroller General exercises under the Act is "executive power in the constitutional sense."

357 U.S. at 356.[26] Accordingly, *Humphrey's Executor* was held to render the removal unlawful.

These cases reflect considerable shifts over the course of time, not only in the Supreme Court's resolutions of particular issues relating to the removal power, but more importantly in the constitutional premises underlying those resolutions. It is not clear, moreover, that these shifts are at an end. Justice Sutherland's decision in *Humphrey's Executor,* handed down the same day as *A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935), is stamped with some of the political science preconceptions characteristic of its era and not of the present day—if not stamped as well, as President Roosevelt thought, with hostility towards the architect of the New Deal.[27] It is not as obvious today as it seemed in the 1930s that there can be such things as genuinely "independent" regulatory agencies, bodies of impartial experts whose independence from the President does not entail correspondingly greater dependence upon the committees of Congress to which they are then immediately accountable; or, indeed, that the decisions of such agencies so

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[26] In other language, the *Wiener* Court suggested its view that, at least with respect to officers exercising "quasi-judicial" powers, the Constitution simply did not vest the President with a power of removal, even one that might be expressly or implicitly limited in appropriate circumstances by Congress. 357 U.S. at 352-53, 356. This language seems squarely at odds with a long line of authority, beginning with *In re Hennen,* 38 U.S. (13 Pet.) 230 (1839), and unchallenged even by *Humphrey's Executor,* which was careful to limit its decision to the question whether the Constitution vested in the President an "illimitable" power of removal. *Humphrey's Executor,* 295 U.S. at 629. We are unwilling to suppose that that line of authority has been overruled by the language in *Wiener.*

[27] Justice Jackson, who had been Roosevelt's attorney general, remarked:

> I really think the decision that made Roosevelt madder at the Court than any other decision was that damn little case of *Humphrey's Executor v. United States.* The President thought they went out of their way to spite him personally and they were giving him a different kind of deal than they were giving Taft.

E. Gerhart, *America's Advocate: Robert H. Jackson* 99 (1958).

clearly involve scientific judgment rather than political choice that it is even theoretically desirable to insulate them from the democratic process. Moreover, "quasi-legislative" and "quasi-judicial" functions can no longer be regarded as extraordinary or even unusual activities of executive agencies. Finally, the expansion of due process protections, *see, e.g., Goldberg v. Kelly,* 397 U.S. 254 (1970), statutorily prescribed procedures for both rule-making and adjudication, *see* 5 U.S.C. §§ 553–559 (1982), and an elaborate system of judicial review, *see* 5 U.S.C. §§ 701–706 (1982), have provided in more targeted fashion some of the protection against political intervention, when it is inappropriate, which *Humphrey's Executor* sought to provide wholesale. It has in any event always been difficult to reconcile *Humphrey's Executor's* "headless fourth branch" with a constitutional text and tradition establishing three branches of government—assuming, as the rationale though not the narrow holding of *Humphrey's Executor* requires, that the presidential removal for cause permitted under the statute upheld there did not include removal because of the appointee's failure to accept presidential instructions regarding matters of policy or statutory application delegated to him by Congress.

Some knowledgeable observers, *see, e.g.,* Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 633–40 (1984), think that abandonment of the *Humphrey's Executor* analysis has been presaged by the Supreme Court's 1983 decision in *INS v. Chadha*, 462 U.S. at 919, which declared invalid the legislative veto of agency action characterized in the majority and one of the dissenting opinions as "quasi-legislative," *see id.* at 953 n.16 (majority); *id.* at 989 (White, J., dissenting), and in the concurrence as "judicial in nature," *see id.* at 966 n.10 (Powell, J., concurring). *See also Process Gas Consumers Group v. Consumer Energy Council of America*, 463 U.S. 1216 (1983), *aff'g mem. Consumers Union of United States, Inc. v.*

FTC, 691 F.2d 575 (D.C. Cir. 1982) (en banc) (per curiam) (applying the holding of *Chadha* to legislative veto of rulemaking by an "independent" regulatory agency). Assuredly some of the language of the majority opinion in *Chadha* does not lie comfortably beside the central revelation of *Humphrey's Executor* that an officer such as a Federal Trade Commissioner "occupies no place in the executive department," and that an agency which exercises only "quasi-legislative or quasi-judicial powers" is "an agency of the legislative or judicial departments of the government," 295 U.S. at 628.[28]

The Supreme Court's signals are not sufficiently clear, however, to justify our disregarding the rationale of *Humphrey's Executor*, and we view our present task as one of placing the facts before us into the framework established by *Humphrey's Executor* and by the holdings of earlier cases (including *Myers*) which *Humphrey's Executor* did not purport to overrule. In approaching that task,

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[28] *See, e.g.*, the following:

> To be sure, some administrative agency action—rulemaking, for example—may resemble "lawmaking." . . . This Court has referred to agency activity as being "quasi-legislative" in character. *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). Clearly, however, "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952). See *Buckley v. Valeo*, 424 U.S., at 123. When the Attorney General performs his duties pursuant to § 244, he does not exercise "legislative" power. . . . It is clear . . . that the Attorney General acts in his presumptively Art. II capacity when he administers the Immigration and Nationality Act. Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. . . . Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto.

462 U.S. at 953–54 n.16.

it becomes apparent at the outset that the present case falls neatly between the two stools of *Myers* and *Humphrey's Executor.* The Comptroller General is neither a "purely executive officer[ ]" whom *Myers* (as reinterpreted by *Humphrey's Executor, see* 295 U.S. at 627–28) requires to be subject to discretionary presidential removal; nor an officer such as that said to be involved in *Humphrey's Executor,* who "occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President," *id.* at 628. Rather, his status, insofar as the removal powers of the President are concerned, falls precisely within the no-man's land described in the last substantive paragraph of the *Humphrey's Executor* opinion:

> To the extent that, between the decision in the *Myers* case, which sustains the unrestrictable power of the President to remove purely executive officers, and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

Id. at 632.

It is unquestionable that some of the Comptroller General's powers—indeed, we will posit for purposes of the present decision, *all* except those at issue here—consist of (in the words of *Humphrey's Executor*) "specified duties as a legislative . . . aid," in the performance of which he "cannot in any proper sense be characterized as an arm or an eye of the executive." *Id.* at 628.[29] The Comptroller

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[29] *See, e.g.,* 2 U.S.C. § 686 (1982) (Comptroller General shall report unlawful impoundment of funds to both Houses of Congress); 2 U.S.C. § 687 (1982) (Comptroller General may sue the United States to force obligation of unlawfully impounded funds); 31 U.S.C. § 712(2) (1982) (Comptroller General shall estimate cost of compliance with expenditure restrictions in appropriations bills, report to Congress and make recommendations); 31 U.S.C. § 712(3) (1982) (Comptroller General shall analyze the efficiency of executive-agency expenditures of interest to

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General's powers under the automatic deficit reduction process, however, do not come within that category. Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts. The first of these specifications requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an interpretation of the law en-

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Congress); 31 U.S.C. § 712(4) (1982) (Comptroller General shall make investigations at the request of either House or an appropriate committee thereof); 31 U.S.C. § 712(5) (1982) (Comptroller General shall give assistance and information to appropriate congressional committees); 31 U.S.C. § 716 (1982) (Comptroller General may sue heads of agencies to obtain audit information); 31 U.S.C. § 717(b) (1982) (Comptroller General shall evaluate the results of government activities at the request of either House of Congress or appropriate committees thereof); 31 U.S.C. § 717(c)-(d) (1982) (Comptroller General shall assist Congress and congressional committees in developing methods for the assessment of the results of governmental activities); 31 U.S.C. § 719 (1982) (Comptroller General shall make various reports to Congress and congressional committees).

The special relationship between the Comptroller General and Congress that is expressed in these statutes makes natural the frequent description of the Comptroller General and the General Accounting Office as "part of" or "an agency of" the legislative branch. *See, e.g., Bowsher v. Merck & Co.,* 460 U.S. 824, 844 (1983); *McDonnell Douglas Corp. v. United States,* 754 F.2d 365, 368 (Fed. Cir. 1985); *United States v. McDonnell Douglas Corp. v. United States,* 751 F.2d 220, 224 (8th Cir. 1984); *Delta Data Sys. Corp. v. Webster,* 744 F.2d 197, 201 n.1 (D.C. Cir. 1984); *but cf., e.g., Lear Siegler, Inc. v. Lehman,* No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *Ameron, Inc. v. United States Army Corps of Eng'rs, 607 F. Supp. 962 (D. N.J. 1985), appeal filed,* No. 85-5226 (3d Cir.); *United States ex rel. Brookfield Constr. Co. v. Stewart,* 234 F. Supp. 94, 99-100 (D.D.C.), *aff'd,* 339 F.2d 753 (D.C. Cir. 1964) (per curiam). We need not and do not decide, however, whether such characterizations are accurate.

acted by Congress, similarly a power normally committed initially to the Executive under the Constitution's prescription that he "take Care that the Laws be faithfully executed." Art. II, § 3. *And both of these specifications by the Comptroller General are, by the present law, made binding upon the President in the latter's application of the law.* Act § 252(a)(3). Indeed, the Comptroller General is explicitly directed to report to Congress on the extent to which the President follows his instructions. Act § 253. In our view, these cannot be regarded as anything but executive powers in the constitutional sense.

We are, therefore, in the no-man's land described by *Humphrey's Executor,* confronting an officer whose powers are neither exclusively executive nor exclusively nonexecutive. The Comptroller General argues, in essence, that this territory should be awarded to the "exclusively nonexecutive" side—that so long as the officer in question exercises some, or at least a substantial number of, nonexecutive powers, the constitutional restrictions upon the manner of his removal are the same as those applicable in *Humphrey's Executor.* We cannot accept that view.

What has been at issue in the congressional-executive dispute over the power of removal that began in the First Congress is not control over the officer but, ultimately, control over the governmental functions that he performs. And the object of all the Supreme Court's opinions on the subject has been to assure, in the words of Justice Story quoted in *Humphrey's Executor,* "that neither of the departments in reference to each other '[shall] possess, directly or indirectly, an overruling influence in the administration of their respective powers.'" 295 U.S. at 630 (quoting J. Story, *Commentaries on the Constitution of the United States* § 530 (4th ed. 1873)). The pursuit of that principle becomes a foolish game if all that is necessary for Congress to acquire an "overruling influence" over the administration of a constitutional executive power, no matter how significant it may be, is to confer

that power upon an official who exercises one or more nonexecutive powers as well. Nor are we disposed to resolve this matter on the basis of whether there is an "adequate" admixture of nonexecutive powers, or whether nonexecutive powers "predominate"; those are neither judicially manageable nor congressionally knowable standards. Thus, under the Comptroller General's theory the heads of most major executive agencies, since they exercise some quasi-legislative or quasi-judicial powers, would currently qualify for *Humphrey's Executor* treatment—and it is impossible to imagine any executive officer who could not be made to qualify by sagacious congressional conferral of nonexecutive powers in the future. On the Comptroller General's theory, not only he but also the Director of the OMB could be subjected to congressional removal.

Having concluded that we are in the middle ground, and that the middle ground cannot uniformly be accorded *Humphrey's Executor* treatment, we must decide precisely what treatment the present facts demand. At this point another distinction between *Humphrey's Executor* and the present case becomes relevant: the former upheld a statute that imposed no more than a *partial* restriction upon the presidential power of removal—removal without cause was prohibited, but presidential removal for "inefficiency, neglect of duty, or malfeasance in office" was allowed. The statute governing removal of the Comptroller General, by contrast, eliminates *all* presidential power of removal, and—much beyond that—confers the power of removal upon Congress. The enormous difference between the two, insofar as impact upon the balance of powers is concerned, is apparent. As was observed by the Court in *Myers,* which, unlike *Humphrey's Executor,* did involve the assertion of removal power by the Congress:

> The Court . . . has recognized in the *Perkins* case that Congress, in committing the appointment of such inferior officers to the heads of departments, may prescribe incidental regulations controlling and restricting the latter in the exercise of the

> power of removal. But the Court never has held, nor reasonably could hold . . ., that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power.

272 U.S. at 161. It remains true that the Supreme Court has never sanctioned congressional assertion of such a power. We think it at least questionable whether the power would be approved even with respect to officers of the United States who exercise only "quasi-legislative" powers in the *Humphrey's Executor* sense—since it would dramatically reduce the value of the right to appoint such officers which the Constitution has assured to the Executive or to the Courts of Law, a right that the Supreme Court has regarded as an important element of the balance of powers, prompted by the founders' often expressed fear "that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." *Buckley v. Valeo,* 424 U.S. at 129. We are confident, however, that congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws. Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey. Giving such power over executive functions to Congress violates the fundamental principle expressed by Montesquieu upon which the theory of separated powers rests: "When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehension may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner." Montesquieu, *The Spirit of Laws,* vol. I, bk. XI, ch. 6, at 152 (London 1823). *See also The Federalist No. 48,* at 327 (J. Madison) (P. Ford ed. 1898) ("[N]one of [the branches] ought to possess, directly or indirectly, an overruling influence over the others, in the administration of their respective powers.").

The Comptroller General argues, however, that a congressional removal power limited to *cause* (which is what we have here) no more enables Congress to control executive powers than did the presidential removal power for cause, which was retained by the statute at issue in *Humphrey's Executor*, enable the President to control the exclusively "quasi-legislative" and "quasi-judicial" powers of the Federal Trade Commission. It is not clear, to begin with, that a "quasi-legislative" power is the same as a legislative power in the constitutional sense, so that the intrusion upon the Executive here is parallel to the intrusion upon the Congress there.[30] Assuming, however, that it is, there are several answers to the Comptroller General's objection. *Humphrey's Executor* neither faced nor considered the question whether the limitations imposed by the doctrine of separation of powers on the scope of executive authority over the removal of nonexecutive officers are precisely equal to the analogous limitations on the scope of congressional authority over the removal of executive officers. Parity is no more to be expected there than it is with respect to the scope of the power to appoint, as to which the Constitution grants only a subordinate role to the Congress. It is the starting point of all judicial analysis in this area, *see, e.g., In re Hennen*, 38 U.S. (13 Pet.) 230 (1839), that the President's power to remove, however much it may be restricted, derives from the con-

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[30] Justice Jackson aptly characterized the ambiguity of the "quasi-legislative" and "quasi-judicial" categories enshrined in constitutional jurisprudence by *Humphrey's Executor* as follows:

> Administrative agencies have been called quasi-legislative, quasi-executive or quasi-judicial, as the occasion required, in order to validate their functions within the separation-of-powers scheme of the Constitution. The mere retreat to the qualifying "quasi" is implicit with confession that all recognized classifications have broken down, and "quasi" is a smooth cover which we draw over our confusion as we might use a counterpane to conceal a disordered bed.

FTC v. Ruberoid Co., 343 U.S. 470, 478–88 (1952) (Jackson, J., dissenting).

stitutional grant of his power to appoint; and we think the permissible impact of that power to remove upon an officer's independence, in comparison to the permissible impact of any such congressional power, may properly reflect the greater strength of that pedigree.[31] Moreover, insofar as effect upon balance of powers is concerned, congressional power to remove is much more potent, since the Executive has no means of retaliation that may dissuade Congress from exercising it—other than leaving the office vacant, thereby impairing the Executive's own functions. Congress, on the other hand, has many ways to make the President think long and hard before he makes a "for cause" removal that Congress disapproves, ranging from budget constriction to refusal to confirm a successor.

It seems to us entirely clear under the recent landmark decision in *INS v. Chadha,* 462 U.S. 919 (1983), that if the present statute had not inserted the Comptroller General between the President and the report of the Directors of the CBO and the OMB, and if the determinations to be made under the Act by the Comptroller General had been assigned instead to the President himself, Congress could not constitutionally provide for legislative veto of those determinations. It is also unthinkable that Congress could constitutionally provide for veto of those determinations by an officer removable by Congress—the Comptroller General, for example. It seems to us no more constitutionally permissible to achieve the same result *ex ante* in-

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[31] Of course, the Constitution vests Congress with the power to bring and try impeachments of all officers of the United States. We think it apparent, however, that this very limited power of removal, which may be exercised only through the trial and conviction of an officer for "Treason, Bribery, or other high Crimes and Misdemeanors," Art. II, § 4, simply cannot be compared to the congressional removal power at issue in this case in its effect upon the independence of executive officers. Moreover, the existence of such a carefully limited congressional removal power undermines rather than supports the proposition that Congress may attempt to assert an additional power of removal.

stead of *ex post*, prescribing in advance the exercise of executive power, instead of invalidating its exercise.

We hold, therefore, that since the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented. As earlier noted, we need not deliberate concerning the effect of this invalidation upon other portions of the Act, since the Act itself provides the answer: replacement of the automatic deficit reduction process with the fallback deficit reduction process, and preservation of the remainder of the Act intact. The Act also requires, § 274(e), that we stay the order implementing our judgment pending the outcome of any appeal.

* * * * *

We do not minimize the effect of our invalidation of one small section of the Act upon the entire statutory scheme. Our holding today eliminates the automatic deficit reduction process, and gives effect to the prescriptions of the Directors of the OMB and CBO only to the extent that they are adopted by joint resolution, *i.e.*, legislation, under the fallback deficit reduction process. It may seem odd that this curtailment of such an important and hard-fought legislative program should hinge upon the relative technicality of authority over the Comptroller General's removal—particularly when we have rejected the more intuitive "excessive delegation" arguments that were the focus of the attacks upon the legislation by its opponents on the floor of Congress and by the plaintiffs here. But the balance of separated powers established by the Constitution consists precisely of a series of technical provisions that are more important to liberty than superficially appears, and whose observance cannot be approved or rejected by the courts as the times seem to require. Both of these points have been eloquently expressed by a re-

spected scl ar in course of discussing application of the Constitutio guarantee against removal of judges to officials appoint under Article I but in fact exercising Article III judicial powers:

> Mid-twentieth century Americans have become accustomed to assuming that the central constitutional method of protecting individual freedoms from being overridden by government ukase is to prevent governmental intrusions into certain defined zones of individual conduct. Thus, we quite rightly applaud actions enshrining constitutional rights to freedom of speech, religion, privacy, and equal protection.
>
> Those who wrote the Constitution, however, did not employ this technique. Rather, they emphasized the virtues of limiting governmental power and then dividing the remaining power among autonomous government compartments. Hence, most of our constitutional rights of individual liberty or autonomy are stated in constitutional amendments. The body of the Constitution as originally written is principally an exercise in applying the concepts of federalism and separation of powers to the new American nation. The framers were not disciples of John Stuart Mill, who had not yet been born, but of Montesquieu, whom they had read carefully.
>
> . . . .
>
> . . . [P]art of the value of a clearly expressed, constitutional separation-of-powers principle often inheres in its apparent rigidity or inability to adapt easily to different solutions. As a nation, one question we must face every day is how far judges and legislators should be separated. Many rational answers to that question are possible. The United States has chosen, by the device of a written constitution, and on the basis of specific historical experience, to resolve that question at one time and in one way for almost all cases. To respect that judgment promotes stability, predictability and consistency, and avoids constant reexamination of troublesome policy issues underlying the question.

Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 Geo. L.J. 297, 301–02, 311 (1981).

We observe, moreover, that although we have rejected the argument based upon the doctrine of unconstitutional delegation, the more technical separation-of-powers requirements we have relied upon may serve to further the policy of that doctrine more effectively than the doctrine itself. Unconstitutional delegation has been invoked by the federal courts to invalidate legislation only twice in almost 200 years, and the possibility of such invalidation, at least in modern times, is not a credible deterrent against the human propensity to leave difficult questions to somebody else. The instances are probably innumerable, however, in which Congress has chosen to decide a difficult issue itself because of its reluctance to leave the decision—as our holding today reaffirms it must—to an officer within the control of the executive branch.

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPRESENTATIVE MIKE SYNAR, ET AL., PLAINTIFFS,

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS.

Civil Action No. 85-3945

NATIONAL TREASURY EMPLOYEES UNION, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT,

UNITED STATES SENATE, SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE UNITED STATES HOUSE OF REPRESENTATIVES, COMPTROLLER GENERAL OF THE UNITED STATES, INTERVENORS.

Civil Action No. 85-4106

Filed, February 7, 1986, James E. Davey, Clerk

ORDER

Upon consideration of the pending dispositive motions filed by the parties in the above actions, the memoranda of points and authorities in support thereof and in opposition thereto, and the entire record herein, and all parties having been heard in open court thereon, and for the reasons stated in the accompanying opinion, it is by the court this *7th* day of February, 1986,

ORDERED that the automatic deficit reduction process established by the Balanced Budget and Emergency Deficit Control Act of 1985, under which the President is required to issue a sequestration order implementing the budget reduction specifications of a report prepared by the Comptroller General, be, and hereby is, declared un-

constitutional on the ground that it vests executive power in the Comptroller General, an officer removable by Congress; and it is further

ORDERED that the presidential sequestration order issued on February 1, 1986 pursuant to the unconstitutional automatic deficit reduction process be, and hereby is, declared without legal force and effect; and it is further

ORDERED that such action is without prejudice to implementation of the alternate deficit reduction process specifically set forth in section 274(f) of the Act to cover the eventuality of the invalidation declared above;

ORDERED, pursuant to subsection 274(e) of the Act, that the effect of this judgment be, and hereby is, stayed during the pendency of any appeal taken under subsection 274(b) of the Act.

/s/ ANTONIN SCALIA,
Circuit Judge of the United States Court of Appeals for the District of Columbia Circuit.

/s/ NORMA HOLLOWAY JOHNSON,
District Judge of the United States District Court for the District of Columbia.

/s/ OLIVER GASCH,
Senior District Judge of the United States District Court for the District of Columbia.

MOTION OF NATIONAL TREASURY EMPLOYEES UNION TO FILE AMENDED COMPLAINT FOR DECLARATORY RELIEF FILED FEBRUARY 7, 1986 AND ATTACHED AMENDED COMPLAINT FOR DECLARATORY RELIEF, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (Title of case omitted in printing)

The National Treasury Employees Union (NTEU) requests permission to file the attached amended complaint. The amended complaint alters NTEU's original complaint in one respect: it seeks to add an individual plaintiff, who is an NTEU member and civil service retiree. Neither the request for relief nor the causes of action alleged have in any way been altered.

We seek to file this amended complaint because we have just been informed that the government is today filing a brief in the Supreme Court in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America et al.* v. *Brock*, 746 F. 2d 739 (D.C. Ct. 1984), cert. granted, No. 84-1777 (Oct. 15, 1985), in which the government will challenge the doctrine of representational standing. Counsel for the United States has authorized us to state that it consents to the granting of this motion.

Respectfully submitted,

/s/ LOIS G. WILLIAMS,
Director of Litigation,

/s/ GREGORY O'DUDEN,
Assistant Director of Litigation,

National Treasury Employees Union.

AMENDED COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

The claims presented in this complaint arise from the enactment of the Balanced Budget and Emergency Control Act of 1985 (the "Act"). That statute creates a procedure designed to reduce the federal deficit with the aim of securing a balanced federal budget by 1991. Key provi-

sions of the Act which authorize cuts in federal spending are, however, unconstitutional because they contravene the lawmaking requirements of the Constitution as well as principles of separation of powers.

JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. sections 1331 and subsection 274(a) of the Act. Section 274(a) requires that this action be heard by a three-judge court, pursuant to 28 U.S.C. 2284. The merits of the action are required to be heard on an expedited basis.

VENUE

2. Venue is properly laid before the Court pursuant to 28 U.S.C. 1391(e).

PARTIES

3. Plaintiff National Treasury Employees Union (hereinafter referred to as NTEU) is an unincorporated association having its principal place of business at 1730 K Street, N.W., Suite 1101, Washington, D.C. 20006. Pursuant to Title VII of the Civil Service Reform Act of 1978, Public Law 95–454, 92 Stat. 1111, NTEU is the exclusive bargaining representative of approximately 120,000 federal employees. NTEU represents the employment interests of federal employees throughout the nation by, *inter alia*, negotiating collective bargaining agreements, arbitrating grievances under such agreements, filing unfair labor practice charges, lobbying Congress for favorable working conditions, pay, and benefits, and litigating the individual and collective rights of federal employees in the federal courts. Among its members are 9,000 retired federal employees. NTEU sues here on behalf of its members.

4. Plaintiff Van Riddel is an NTEU member and has the status of annuitant under the federal civil service retirement laws.

5. Defendant is the United States of America.

STATEMENT OF CLAIMS

6. The President signed the Act into law on December 12, 1985. The Act took effect immediately. Sections 251 and 252 of the Act create a procedure for across-the-board spending cuts if it is found that certain deficit targets, specified in the Act, cannot be met in a particular fiscal year.

7. This critical finding is jointly made at first by the Director of the Office of Management and Budget, an executive branch officer, and the Director of the Congressional Budget Office, a legislative branch officer. The Comptroller General, a legislative branch officer, then reviews their determination and issues a final determination to the President. Under section 252 of the Act, the President must then carry out these budget cuts which are fully described in a Comptroller General report.

8. The determinations described above entail the exercise of considerable judgment. They are not simply ministerial or precatory but actually initiate the process for cutting billions of dollars in federal spending.

CAUSES OF ACTION

9. The Presidential order implementing the spending cuts effectively modifies already enacted legislation requiring higher spending levels. The Presidential order is legal only if the power it exercises has been validly delegated to the President and the other government officers who participate in the Act's spending cutting mechanism. Because the Act's prescribed procedures for spending cuts does not satisfy the lawmaking provisions of Article I, section 7 of the Constitution, that process is unconstitutional.

10. Even if the Act's spending cutting procedure could be legally delegated, the particular delegation process established in the Act is invalid. That delegation procedure involves members of both the legislative and executive branches and accordingly, violates the Constitution's separation of powers scheme.

11. Plaintiff Riddel and NTEU's members, including those who are retired federal employees, are injured by these unconstitutional provisions. For example, as a result of the "automatic" spending cutting provisions described above, a cost-of-living-adjustment due federal retirees on January 1, 1986, has been withheld. Unless this Court declares sections 251 and 252 of the Act unconstitutional, they will take full effect and plaintiff and NTEU's members will continue to be adversely affected by the budget reduction provision.

REQUEST FOR RELIEF

WHEREFORE, based on the foregoing, plaintiff requests that the Court

1. Immediately convene a three judge court pursuant to 28 U.S.C. 2284;

2. Declare sections 251 and 252 of the Act unconstitutional;

3. Declare that the President's power to order spending reductions is invalid;

4. Grant plaintiff a reasonable amount of attorneys' fees and costs;

5. Grant plaintiff such other and further relief as may be just and proper.

Respectfully submitted,

/s/ LOIS G. WILLIAMS,
Director of Litigation,

/s/ GREGORY O'DUDEN,
Assistant Director of Litigation,

National Treasury Employees Union.

RESPONSE OF UNITED STATES TO MOTION TO AMEND COMPLAINT, FILED FEBRUARY 11, 1986, UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA (Title of case omitted in printing)

Prior to the entry of the Court's final orders, NTEU moved to amend its complaint in Civil Action No. 85-4106 to add an individual party plaintiff, as a protection against arguments the United States may raise in the Supreme Court against NTEU's representational standing. Although the United States consents to the amendment, we wish to point out that no motion or leave of court was required, and that the amended complaint should be deemed filed as of the moment it was received by the Clerk of the Court.[1]

Under Rule 15(a), Fed. R. Civ. P. "[a] party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party * * *." The United States has not served an answer, and its motion for summary judgment in this action is not a "responsive pleading" within the meaning of Rule 15(a). *McDonald* v. *Hall*, 579 F.2d 120, 121 (1st Cir. 1978); *McLellan* v. *Mississippi Power Co.*, 526 F.2d 870, 872 n. 2 (5th Cir. 1976), *modified on other grounds*, 545 F.2d 919 (5th Cir. 1977) (*en banc*). Although the amended complaint adds a new party, the

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[1] We were informed by NTEU that it presented its amended complaint to the Clerk on Thursday, February 6, but that the Clerk refused to accept the amended complaint for filing without a motion. NTEU filed its motion Friday morning, February 7. As we show, no motion was necessary. To clarify the record on appeal, the Court may wish to treat NTEU's motion as a motion under Rule 60(a), Fed. R. Civ. P. to correct a clerical mistake and have its amended complaint deemed filed when presented nunc pro tunc. *Cf. Pattie* v. *Schwartz*, 386 F.2d 300, 303 (8th Cir. 1968). The Court has jurisdiction to grant such a motion, notwithstanding the fact that notices of appeal have been filed, because no appeals have been docketed yet in the Supreme Court.

(11) (10) (10)

Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX—VOLUME II

ALAN B. MORRISON,
Counsel for Mike Synar, et al.,
2000 P St., N.W., Suite 700,
Washington, D.C. 20036.
(202) 785-3704

CHARLES FRIED,
Counsel for United States,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.
(202) 633-2201

LOIS G. WILLIAMS,
Counsel for National Treasury Employees Union,
1730 K St., N.W.,
Washington, D.C. 20006.
(202) 785-4411

LLOYD N. CUTLER,
Counsel for Comptroller General,
1666 K St., N.W.,
Washington, D.C. 20006.
(202) 872-6100

MICHAEL DAVIDSON,
Counsel for United States Senate,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

STEVEN R. ROSS,
Counsel for Thomas P. O'Neill, Jr., et al.,
H-105 The Capitol,
Washington, D.C. 20515.
(202) 225-9700

JURISDICTIONAL STATEMENTS FILED FEBRUARY 18, 1986
PROBABLE JURISDICTION NOTED FEBRUARY 24, 1986

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VOLUME II

Constitutional and Statutory Provisions Involved

1. Article I, Section 1, of the United States Constitution provides:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

2. Article I, Section 2, Clause 5, of the United States Constitution provides:

> The House of Representatives shall chuse their Speaker and other Officers; and shall have the sole Power of Impeachment.

3. Article I, Section 3, Clauses 5 and 6, of the United States Constitution provide:

> The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of President of the United States.
>
> The Senate shall have the sole Power to try all Impeachments. When sitting for that Purpose, they shall be on Oath or Affirmation. When the President of the United States is tried, the Chief Justice shall preside: And no Person shall be convicted without the Concurrence of two thirds of the Members present.

4. Article I, Section 8, Clause 1, of the United States Constitution provides in pertinent part:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; * * *.

5. Article I, Section 9, Clause 7, of the United States Constitution provides:

> No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;

and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.

6. Article II, Section 1, of the United States Constitution provides in pertinent part:

> The executive Power shall be vested in a President of the United States of America. * * *

7. Article II, Section 2, Clause 2, of the United States Constitution provides in pertinent part:

> * * * he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

8. Article II, Section 3, of the United States Constitution provides in pertinent part:

> * * * he shall take Care that the Laws be faithfully executed, * * *.

9. Article II, Section 4, of the United States Constitution provides:

> The President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors.

10. The Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20, provides in pertinent part:

AN ACT To provide a national budget system, and an independent audit of Government accounts, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

TITLE I.—DEFINITIONS.

SECTION 1. This Act may be cited as the "Budget and Accounting Act, 1921."

SEC. 2. When used in this Act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission, board, bureau, office, agency, or other establishment of the Government, including the municipal government of the District of Columbia, but do not include the Legislative Branch of the Government or the Supreme Court of the United States;

The term "the Budget" means the Budget required by section 201 to be transmitted to Congress;

The term "Bureau" means the Bureau of the Budget;

The term "Director" means the Director of the Bureau of the Budget; and

The term "Assistant Director" means the Assistant Director of the Bureau of the Budget.

TITLE II.—THE BUDGET.

[Title II provides for the transmission of an annual budget by the President to the Congress and for the establishment of the Bureau of the Budget in the Treasury Department. The full provisions of Title II are set forth at 42 Stat. 20–23.]

TITLE III.—GENERAL ACCOUNTING OFFICE.

SEC. 301. There is created as establishment of the Government to be known as the General Accounting Office, which shall be independent of the executive departments and under the control and direction of the Comptroller General of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the General Accounting Office at their grades and salaries on

July 1, 1921, and all books, records, documents, papers, furniture, office equipment and other property of the office of the Comptroller of the Treasury shall become the property of the General Accounting Office. The Comptroller General is authorized to adopt a seal for the General Accounting Office.

Sec. 302. There shall be in the General Accounting Office a Comptroller General of the United States and an Assistant Comptroller General of the United States, who shall be appointed by the President with the advice and consent of the Senate, and shall receive salaries of $10,000 and $7,500 a year, respectively. The Assistant Comptroller General shall perform such duties as may be assigned to him by the Comptroller General, and during the absence or incapacity of the Comptroller General, or during a vacancy in that office, shall act as Comptroller General.

Sec. 303. Except as hereinafter provided in this section, the Comptroller General and the Assistant Comptroller General shall hold office for fifteen years. The Comptroller General shall not be eligible for reappointment. The Comptroller General or the Assistant Comptroller General may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the Comptroller General or Assistant Comptroller General has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any Comptroller General or Assistant Comptroller General removed in the manner herein provided shall be ineligible for reappointment to that office. When a Comptroller General or Assistant Comptroller General attains the age of seventy years, he shall be retired from his office.

Sec. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the

Office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this Act, be vested in and imposed upon the General Accounting Office and be exercised without direction from any other officer. The balances certified by the Comptroller General shall be final and conclusive upon the executive branch of the Government. The revision by the Comptroller General of settlements made by the six auditors shall be discontinued, except as to settlements made before July 1, 1921.

The administrative examination of the accounts and vouchers of the Postal Service now imposed by law upon the Auditor for the Post Office Department shall be performed on and after July 1, 1921, by a bureau in the Post Office Department to be known as the Bureau of Accounts, which is hereby established for that purpose. The Bureau of Accounts shall be under the direction of a Comptroller, who shall be appointed by the President with the advice and consent of the Senate, and shall receive a salary of $5,000 a year. The Comptroller shall perform the administrative duties now performed by the Auditor for the Post Office Department and such other duties in relation thereto as the Postmaster General may direct. The appropriation of $5,000 for the salary of the Auditor for the Post Office Department for the fiscal year 1922 is transferred and made available for the salary of the Comptroller, Bureau of Accounts, Post Office Department. The officers and employees of the Office of the Auditor for the Post Office Department engaged in the administrative examination of accounts shall become officers and employees of the Bureau of Accounts at their grades and salaries on July 1, 1921. The appropriations for salaries and for contingent and miscellaneous expenses and tabulating equipment for such office for the fiscal year 1922, and all books, records, documents, papers, furniture, office equipment, and other property shall be apportioned between, transferred to, and made available for the Bureau of Accounts and the General Ac-

counting Office, respectively, on the basis of duties transferred.

SEC. 305. Section 236 of the Revised Statutes is amended to read as follows:

"SEC. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

SEC. 306. All laws relating generally to the administration of the departments and establishments shall, so far as applicable, govern the General Accounting Office. Copies of any books, records, papers, or documents, and transcripts from the books and proceedings of the General Accounting Office, when certified by the Comptroller General or the Assistant Comptroller General under its seal, shall be admitted as evidence with the same effect as the copies and transcripts referred to in sections 882 and 886 of the Revised Statutes.

SEC. 307. The Comptroller General may provide for the payment of accounts or claims adjusted and settled in the General Accounting Office, through disbursing officers of the several departments and establishments, instead of by warrant.

SEC. 308. The duties now appertaining to the Division of Public Moneys of the Office of the Secretary of the Treasury, so far as they relate to the covering of revenues and repayments into the Treasury, the issue of duplicate checks and warrants, and the certification of outstanding liabilities for payment, shall be performed by the Division of Bookkeeping and Warrants of the Office of the Secretary of the Treasury.

SEC. 309. The Comptroller General shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States.

Sec. 310. The offices of the six auditors shall be abolished, to take effect July 1, 1921. All other officers and employees of these offices except as otherwise provided herein shall become officers and employees of the General Accounting Office at their grades and salaries on July 1, 1921. All books, records, documents, papers, furniture, office equipment, and other property of these offices, and of the Division of Bookkeeping and Warrants, so far as they relate to the work of such division transferred by section 304, shall become the property of the General Accounting Office. The General Accounting Office shall occupy temporarily the rooms now occupied by the office of the Comptroller of the Treasury and the six auditors.

Sec. 311. (a) The Comptroller General shall appoint, remove, and fix the compensation of such attorneys and other employees in the General Accounting Office as may from time to time be provided for by law.

(b) All such appointments, except to positions carrying a salary at a rate of more than $5,000 a year, shall be made in accordance with the civil-service laws and regulations.

(c) No person appointed by the Comptroller General shall be paid a salary at a rate of more than $6,000 a year, and not more than four persons shall be paid a salary at a rate of more than $5,000 a year.

(d) All officers and employees of the General Accounting Office, whether transferred thereto or appointed by the Comptroller General, shall perform such duties as may be assigned to them by him.

(e) All official acts performed by such officers or employees specially designated therefor by the Comptroller General shall have the same force and effect as though performed by the Comptroller General in person.

(f) The Comptroller General shall make such rules and regulations as may be necessary for carrying on the work of the General Accounting Office, including rules and regulations concerning the admission of attorneys to practice before such office.

SEC. 312. (a) The Comptroller General shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the General Accounting Office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The Comptroller General shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The Comptroller General shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the Bureau of the Budget as it may request from time to time.

SEC. 313. All departments and establishments shall furnish to the Comptroller General such information regarding the powers, duties, activities, organization, financial

transactions, and methods of business of their respective offices as he may from time to time require of them; and the Comptroller General, or any of his assistants or employees, when duly authorized by him, shall, for the purpose of securing such information, have access to and the right to examine any books, documents, papers, or records of any such department or establishment. The authority contained in this section shall not be applicable to expenditures made under the provisons of section 291 of the Revised Statutes.

SEC. 314. The Civil Service Commission shall establish an eligible register for accountants for the General Accounting Office, and the examinations of applicants for entrance upon such register shall be based upon questions approved by the Comptroller General.

SEC. 315. (a) All appropriations for the fiscal year ending June 30, 1922, for the offices of the Comptroller of the Treasury and the six auditors, are transferred to and made available for the General Accounting Office, except as otherwise provided herein.

(b) During such fiscal year the Comptroller General, within the limit of the total appropriations available for the General Accounting Office, may make such changes in the number and compensation of officers and employees appointed by him or transferred to the General Accounting Office under this Act as may be necessary.

(c) There shall also be transferred to the General Accounting Office such portions of the appropriations for rent and contingent and miscellaneous expenses, including allotments for printing and binding, made for the Treasury Department for the fiscal year ending June 30, 1922, as are equal to the amounts expended from similar appropriations during the fiscal year ending June 30, 1921, by the Treasury Department for the offices of the Comptroller of the Treasury and the six auditors.

(d) During the fiscal year ending June 30, 1922, the appropriations and portions of appropriations referred to in this section shall be available for salaries and expenses of

the General Accounting Office, including payment for rent in the District of Columbia, traveling expenses, the purchase and exchange of law books, books of reference, and for all necessary miscellaneous and contingent expenses.

SEC. 316. The General Accounting Office and the Bureau of Accounts shall not be construed to be a bureau or office created since January 1, 1916, so as to deprive employees therein of the additional compensation allowed to civilian employees under the provisions of section 6 of the Legislative, Executive, and Judicial Appropriation Act for the fiscal year ending June 30, 1922, if othewise entitled thereto.

SEC. 317. The provisions of law prohibiting the transfer of employees of executive departments and independent establishments until after service of three years shall not apply during the fiscal year ending June 30, 1922, to the transfer of employees to the General Accounting Office.

SEC. 318. This Act shall take effect upon its approval by the President: *Provided*, That sections 301 to 317, inclusive, relating to the General Accounting Office and the Bureau of Accounts, shall take effect July 1, 1921.

Approved, June 10, 1921.

11. 31 U.S.C. § 702 provides in pertinent part:

(a) The General Accounting Office is an instrumentality of the United States Government independent of the executive departments.

(b) The head of the Office is the Comptroller General of the United States. The Office has a Deputy Comptroller General of the United States.

* * *

12. 31 U.S.C. § 703 provides in pertinent part:

(a)(1) The Comptroller General and Deputy Comptroller General are appointed by the President, by and with the advice and consent of the Senate.

(2) When a vacancy occurs in the office of Comptroller General or Deputy Comptroller General, a commission is established to recommend individuals to the President for appointment to the vacant office. The commission shall be composed of—

(A) the Speaker of the House of Representatives;

(B) The President pro tempore of the Senate;

(C) the majority and minority leaders of the House of Representatives and the Senate;

(D) the chairmen and ranking minority members of the Committee on Governmental Affairs of the Senate and the Committee on Government Operations of the House; and

(E) when the office of Deputy Comptroller General is vacant, the Comptroller General.

(3) A commission established because of a vacancy in the office of the Comptroller General shall recommend at least 3 individuals. The President may ask the commission to recommend additional individuals.

(b) Except as provided in subsection (e) of this section, the term of the Comptroller General is 15 years. The Comptroller General may not be reappointed. The term of the Deputy Comptroller General expires on the date an individual is appointed Comptroller General. The Deputy

Comptroller General may continue to serve until a successor is appointed.

* * *

(e)(1) A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by—

(A) impeachment; or

(B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—

(i) permanent disability;

(ii) inefficiency;

(iii) neglect of duty;

(iv) malfeasance; or

(v) a felony or conduct involving moral turpitude.

(2) A Comptroller General or Deputy Comptroller General removed from office under paragraph (1) of this section may not be reappointed to the office.

13. Public Law No. 99-177, 99 Stat. 1037 (1985), provides in pertinent part:

Joint Resolution

Increasing the statutory limit on the public debt.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That subsection (b) of section 3101 of title 31, United States Code, is amended by striking out the dollar limitation contained in such subsection and inserting in lieu thereof "$1,847,800,000,000, or $2,078,700,000,000 on and after October 1, 1985,".

* * *

TITLE II—DEFICIT REDUCTION PROCEDURES

SEC. 200. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.—This title may be cited as the "Balanced Budget and Emergency Deficit Control Act of 1985".

* * *

PART A—CONGRESSIONAL BUDGET PROCESS

Subpart I—Congressional Budget

SEC. 201. CONGRESSIONAL BUDGET.

(a) DEFINITIONS.—

(1) Section 3 of the Congressional Budget and Impoundment Control Act of 1974 is amended by adding at the end thereof the following new paragraphs:

"(6) The term 'deficit' means, with respect to any fiscal year, the amount by which total budget outlays for such fiscal year exceed total revenues for such fiscal year. In calculating the deficit for purposes of comparison with the maximum deficit amount under the Balanced Budget and Emergency Deficit Control Act of 1985 and in calculating the excess deficit for purposes of sections 251 and 252 of such Act (notwith-

standing section 710(a) of the Social Security Act), for any fiscal year, the receipts of the Federal Old-Age and Survivors Insurance Trust Fund and the Federal Disability Insurance Trust Fund for such fiscal year and the taxes payable under sections 1401(a), 3101(a), and 3111(a) of the Internal Revenue Code of 1954 during such fiscal year shall be included in total revenues for such fiscal year, and the disbursements of each such Trust Fund for such fiscal year shall be included in total budget outlays for such fiscal year. Notwithstanding any other provision of law except to the extent provided by section 710(a) of the Social Security Act, the receipts, revenues, disbursements, budget authority, and outlays of each off-budget Federal entity for a fiscal year shall be included in total budget authority, total budget outlays, and total revenues and the amounts of budget authority and outlays set forth for each major functional category, for such fiscal year: Amounts paid by the Federal Financing Bank for the purchase of loans made or guaranteed by a department, agency, or instrumentality of the Government of the United States shall be treated as outlays of such department, agency, or instrumentality.

"(7) The term 'maximum deficit amount' means—

"(A) with respect to the fiscal year beginning October 1, 1985, $171,900,000,000;

"(B) with respect to the fiscal year beginning October 1, 1986, $144,000,000,000;

"(C) with respect to the fiscal year beginning October 1, 1987, $108,000,000,000;

"(D) with respect to the fiscal year beginning October 1, 1988, $72,000,000,000;

"(E) with respect to the fiscal year beginning October 1, 1989, $36,000,000,000; and

"(F) with respect to the fiscal year beginning October 1, 1990, zero.

"(8) The term 'off-budget Federal entity' means any entity (other than a privately-owned Government-sponsored entity)—

"(A) which is established by Federal law, and

"(B) the receipts and disbursements of which are required by law to be excluded from the totals of—

"(i) the budget of the United States Government submitted by the President pursuant to section 1105 of title 31, United States Code, or

"(ii) the budget adopted by the Congress pursuant to title III of this Act.

"(9) The term 'entitlement authority' means spending authority described by section 401(c)(2)(C).

"(10) The term 'credit authority' means authority to incur direct loan obligations or to incur primary loan guarantee commitments.".

(2) Paragraph (2) of section 3 of the Congressional Budget and Impoundment Control Act of 1974 is amended by inserting before the comma the following: "or to collect offsetting receipts.".

(b) Congressional Budget Process.—Title III of the Congressional Budget Act of 1974 is amended to read as follows:

"TITLE III—CONGRESSIONAL BUDGET PROCESS

"TIMETABLE

"Sec. 300. The timetable with respect to the congressional budget process for any fiscal year is as follows:

"On or before:	Action to be completed:
First Monday after January 3	President submits his budget.
February 15	Congressional Budget Office submits report to Budget Committees.
February 25	Committees submit views and estimates to Budget Committees.

April 1	Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

"ANNUAL ADOPTION OF CONCURRENT RESOLUTION ON THE BUDGET

"SEC. 301. (a) CONTENT OF CONCURRENT RESOLUTION ON THE BUDGET.—On or before April 15 of each year, the Congress shall complete action on a concurrent resolution on the budget for the fiscal year beginning on October 1 of such year. The concurrent resolution shall set forth appropriate levels for the fiscal year beginning on October 1 of such year, and planning levels for each of the two ensuing fiscal years, for the following—

"(1) totals of new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments;

"(2) total Federal revenues and the amount, if any, by which the aggregate level of Federal revenues should be increased or decreased by bills and resolutions to be reported by the appropriate committees;

"(3) the surplus or deficit in the budget;

"(4) new budget authority, budget outlays, direct loan obligations, and primary loan guarantee commitments for each major functional category, based

on allocations of the total levels set forth pursuant to paragraph (1); and

"(5) the public debt.

* * *

"(i) MAXIMUM DEFICIT AMOUNT MAY NOT BE EXCEEDED.—

"(1)(A) Except as provided in paragraph (2), it shall not be in order in either the House of Representatives or the Senate to consider any concurrent resolution on the budget for a fiscal year under this section, or to consider any amendment to such a concurrent resolution, or to consider a conference report on such a concurrent resolution, if the level of total budget outlays for such fiscal year that is set forth in such concurrent resolution or conference report exceeds the recommended level of Federal revenues set forth for that year by an amount that is greater than the maximum deficit amount for such fiscal year as determined under section 3(7), or if the adoption of such amendment would result in a level of total budget outlays for that fiscal year which exceeds the recommended level of Federal revenues for that fiscal year, by an amount that is greater than the maximum deficit amount for such fiscal year as determined under section 3(7).

"(B) In the House of Representatives the point of order established under subparagraph (A) with respect to the consideration of a conference report or with respect to the consideration of a motion to concur, with or without an amendment or amendments, in a Senate amendment, the stage of disagreement having been reached, may be waived only by a vote of three-fifths of the Members present and voting, a quorum being present.

"(2) Paragraph (1) of this subsection shall not apply if a declaration of war by the Congress is in effect.

"COMMITTEE ALLOCATIONS

"SEC. 302.

* * *

"(f) LEGISLATION SUBJECT TO POINT OF ORDER.—

"(1) IN THE HOUSE OF REPRESENTATIVES.—After the Congress has completed action on a concurrent resolution on the budget for a fiscal year, it shall not be in order in the House of Representatives to consider any bill, resolution, or amendment providing new budget authority for such fiscal year, new entitlement authority effective during such fiscal year, or new credit authority for such fiscal year, or any conference report on any such bill or resolution, if—

"(A) the enactment of such bill or resolution as reported;

"(B) the adoption and enactment of such amendment; or

"(C) the enactment of such bill or resolution in the form recommended in such conference report,

would cause the appropriate allocation made pursuant to subsection (b) for such fiscal year of new discretionary budget authority, new entitlement authority, or new credit authority to be exceeded.

"(2) IN THE SENATE.—At any time after the Congress has completed action on the concurrent resolution on the budget required to be reported under section 301(a) for a fiscal year, it shall not be in order in the Senate to consider any bill or resolution (including a conference report thereon), or any amendment to a bill or resolution, that provides for budget outlays or new budget authority in excess of the appropriate allocation of such outlays or authority reported under subsection (b) in connection with the most recently agreed to concurrent resolution on the budget for such fiscal year.

* * *

PART C—EMERGENCY POWERS TO ELIMINATE DEFICITS IN EXCESS OF MAXIMUM DEFICIT AMOUNT

SEC. 251. REPORTING OF EXCESS DEFICITS.

(a) INITIAL ESTIMATES, DETERMINATIONS, AND REPORT BY OMB AND CBO.—

(1) ESTIMATES AND DETERMINATIONS.—The Director of the Office of Management and Budget and the Director of the Congressional Budget Office (in this part referred to as the "Directors") shall with respect to each fiscal year—

(A) estimate the budget base levels of total revenues and budget outlays that may be anticipated for such fiscal year as of August 15 of the calendar year in which such fiscal year begins (or as of January 10, 1986, in the case of the fiscal year 1986),

(B) determine whether the projected deficit for such fiscal year will exceed the maximum deficit amount for such fiscal year and whether such deficit excess will be greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), and

(C) estimate the rate of real economic growth that will occur during such fiscal year, the rate of real economic growth that will occur during each quarter of such fiscal year, and the rate of real economic growth that will have occurred during each of the last two quarters of the preceding fiscal year.

(2) REPORT.—The Directors jointly shall report to the Comptroller General on August 20 of the calendar year in which such fiscal year begins (or on January 15, 1986, in the case of the fiscal year 1986), estimating the budget base levels of total revenues and total budget outlays for such fiscal year, identifying

the amount of any deficit excess for such fiscal year, stating whether such excess is greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), specifying the estimated rate of real economic growth for such fiscal year, for each quarter of such fiscal year, and for each of the last two quarters of the preceding fiscal year, indicating whether the estimate includes two or more consecutive quarters of negative real economic growth, and specifying (if the excess is greater than $10,000,000,000, or zero in the case of fiscal years 1986 and 1991), by account, for non-defense programs, and by account and programs, projects, and activities within each account, for defense programs, the base from which reductions are taken and the amounts and percentages by which such accounts must be reduced during such fiscal year, in accordance with the succeeding provisions of this part, in order to eliminate such excess.

(3) DETERMINATION OF REDUCTIONS.—The amounts and percentages by which such accounts must be reduced during a fiscal year shall be determined as follows:

(A)(i) If the deficit excess for the fiscal year is greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), such deficit excess shall be divided into halves.

(ii) In the case of fiscal year 1986, the amount of such excess—

(I) shall be multiplied by seven twelfths before being divided into halves in accordance with clause (i), and

(II) shall not exceed $11,700,000,000.

(B) Subject to the exemptions, exceptions, limitations, special rules, and definitions set forth in this section and in sections 255, 256, and 257, the reductions necessary to eliminate one-half of the deficit excess for the fiscal year (as adjusted under subparagraph (A)(ii) in the case of fiscal

year 1986) shall be made in outlays under accounts within major functional category 050 (in this part referred to as outlays under "defense programs"), and the reductions necessary to eliminate the other half of the deficit excess (or the adjusted deficit excess, in the case of fiscal year 1986) shall be made in outlays under other accounts of the Federal Government (in this part referred to as outlays under "non-defense programs").

(C)(i) The total amount by which outlays for automatic spending increases scheduled to take effect during the fiscal year are to be reduced shall be determined in accordance with clause (ii) of this subparagraph.

(ii) Each such automatic spending increase shall be reduced—

(I) to zero (a uniform percentage reduction of 100 percent), or

(II) by a uniform percentage reduction of less than 100 percent calculated in a manner to reduce total outlays for the fiscal year by one-half of the deficit excess (or the adjusted deficit excess, in the case of fiscal year 1986), if the elimination of all such increases would reduce total outlays for the fiscal year by more than one-half of the deficit excess (or the adjusted deficit excess, in the case of fiscal year 1986) for the fiscal year.

(D) The total amount of the outlay reductions determined under subparagraph (C) shall be divided into two amounts:

(i) an amount equal to the outlay reductions attributable to programs specified in subparagraph (A) of section 257(l); and

(ii) an amount equal to the outlay reductions attributable to programs specified in subparagraph (B) of section 257(l).

(E)(i) For purposes of subparagraph (B), one-half of the amount of the reductions determined under clause (i) of subparagraph (D) shall be credited as reductions in outlays under defense programs, and the total amount of reductions in outlays under defense programs required under subparagraph (B) shall be reduced accordingly.

(ii) Sequestration of new budget authority and unobligated balances to achieve the remaining reductions in outlays under defense programs required under subparagraph (B) shall be determined as provided in subsection (d).

(F)(i) For purposes of subparagraph (B)—

(I) one-half of the amount of the reductions determined under clause (i) of subparagraph (D), and

(II) the amount of the reductions determined under clause (ii) of subparagraph (D),

shall be credited as reductions in outlays under non-defense programs, and the total amount of reductions in outlays under non-defense programs required under subparagraph (B) shall be reduced accordingly.

(ii) The maximum reduction permissible for each program to which an exception, limitation, or special rule set forth in subsection (c) or (f) of section 256 applies shall be determined, and the total amount of reductions in outlays under non-defense programs required under subparagraph (B) shall be reduced by the amount of the reduction determined with respect to each such program.

(iii)(I) Except as provided in subclause (II), the maximum reduction permissible for each of the programs to which the special rules set forth in sections 256(d) and 256(k) apply shall be determined, and the total amount of outlays under non-defense programs required under subpara-

graph (B) shall be reduced by the amount of the maximum reductions so determined.

(II) If the maximum reduction determined in accordance with subclause (I) with respect to the programs to which that subclause relates would reduce outlays for such programs by an amount in excess of the remaining amount of the reduction in outlays in non-defense programs required under subparagraph (B), outlays for such programs shall instead be reduced proportionately by such lesser percentage as will achieve such remaining required reductions.

(iv)(I) Sequestrations and reductions under the remaining non-defense programs shall be applied on a uniform percentage basis so as to reduce new budget authority, new loan guarantee commitments, new direct loan obligations, obligation limitations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974 to the extent necessary to achieve any remaining required outlay reductions.

(II) For purposes of determining reductions under subclause (I), any reduction in outlays of the Commodity Credit Corporation under an order issued by the President under section 252 for a fiscal year, with respect to contracts entered into during that fiscal year, that will occur during the succeeding fiscal year, shall be credited as reductions in outlays for the fiscal year in which the order is issued.

The determination of which accounts are within major functional category 050 and which are not, for purposes of subparagraph (B), shall be made by the Directors in a manner consistent with the budget submitted by the President for the fiscal year 1986; except that for such purposes no part of the accounts entitled "Federal Emergency Management Agency, Salaries and expenses (58-0100-0-1-999)" and "Fed-

eral Emergency Management Agency. Emergency management planning and assistance (58-0101-0-1-999)" shall be treated as being within functional category 050.

(4) ADDITIONAL SPECIFICATIONS.—The report submitted under paragraph (2) must also specify (with respect to the fiscal year involved)—

(A) the amount of the automatic spending increase (if any) which is scheduled to take effect in the case of each program providing for such increases, the amount and percentage by which such increase is to be reduced, the amount by which the deficit excess (as adjusted under paragraph (3)(A)(ii), in the case of fiscal year 1986) will be reduced as a result of the elimination or reduction of automatic spending increases (stated separately for increases under programs listed in subparagraph (A) of section 257(l) and increases under programs listed in subparagraph (B) of that section), and the amount (if any) of each such increase, stated in terms of percentage points, which will take effect after reduction under this part;

(B) the amount of the savings (if any) to be achieved in the application of each of the special rules set forth in subsections (c) through (l) of section 256, along with a statement of (i) the new Federal matching rate resulting from the application of subsection (e) of that section, and (ii) the amount of the percentage reduction in payments to the States under section 204 of the Federal-State Extended Unemployment Compensation Act of 1970; and

(C)(i) for defense programs, by account and by program, project, and activity within each account, the reduction (stated in terms of both percentage and amount) in new budget authority

and unobligated balances, together with the estimated outlay reductions resulting therefrom; and

(ii) for non-defense programs, by account, the reduction, stated in terms of both percentage and amount, in new budget authority, new loan guarantee commitments, new direct loan obligations, obligation limitations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, together with the estimated outlay reductions resulting therefrom.

(5) BASIS FOR DIRECTORS' ESTIMATES, DETERMINATIONS, AND SPECIFICATIONS.—The estimates, determinations, and specifications of the Directors under the preceding provisions of this subsection and under subsection (c)(1) shall utilize the budget base, criteria, and guidelines set forth in paragraph (6) and in sections 255, 256, and 257. In the event that the Directors are unable to agree on any items required to be set forth in the report, they shall average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction. The report of the Directors shall also indicate the amount initially proposed for each averaged item by each Director.

(6) BUDGET BASE.—In computing the amounts and percentages by which accounts must be reduced during a fiscal year as set forth in any report required under this subsection for such fiscal year, the budget base shall be determined by—

(A) assuming (subject to subparagraph (C)) the continuation of current law in the case of revenues and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974;

(B) assuming, in the case of all accounts to which subparagraph (A) does not apply, appropriations equal to the prior year's appropriations except to the extent that annual appropriations

or continuing appropriations for the entire fiscal year have been enacted;

(C) assuming that expiring provisions of law providing revenues and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974 do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates; and

(D) assuming (i) that Federal pay adjustments for statutory pay systems (I) will be as recommended by the President, but (II) will in no case result in a reduction in the levels of pay in effect immediately before such adjustments; and (ii) that medicare spending levels for inpatient hospital services will be based upon the regulations most recently issued in final form or proposed by the Health Care Financing Administration pursuant to sections 1886(b)(3)(B), 1886(d)(3)(A), and 1886(e)(4) of the Social Security Act.

Deferrals proposed under section 1013 of the Impoundment Control Act of 1974 during the period beginning October 1 of such fiscal year (or the date of the enactment of this joint resolution in the case of fiscal year 1986) and ending with the date on which the final order is issued under section 252(b) for such fiscal year (or February 1, 1986, in the case of fiscal year 1986) shall not be taken into account in determining such budget base.

(b) Report to President and Congress by Comptroller General.—

(1) Report to be based on OMB-CBO report.—The Comptroller General shall review and consider the report issued by the Directors for the fiscal year and, with due regard for the data, assumptions, and methodologies used in reaching the conclusions set forth therein, shall issue a report to the President and the

Congress on August 25 of the calendar year in which such fiscal year begins (or on January 20, 1986, in the case of the fiscal year 1986), estimating the budget base levels of total revenues and total budget outlays for such fiscal year, identifying the amount of any deficit excess for such fiscal year (adjusted in accordance with subsection (a)(3)(A)(ii), in the case of fiscal year 1986), stating whether such deficit excess (or adjusted deficit excess, in the case of fiscal year 1986) will be greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991), specifying the estimated rate of real economic growth for such fiscal year, for each quarter of such fiscal year, and for each of the last two quarters of the preceding fiscal year, indicating whether the estimate includes two or more consecutive quarters of negative economic growth, and specifying (if the excess is greater than $10,000,000,000, or zero in the case of fiscal years 1986 and 1991), by account, for non-defense programs, and by account and programs, projects, and activities within each account, for defense programs, the base from which reductions are taken and the amounts and percentages by which such accounts must be reduced during such fiscal year in order to eliminate such deficit excess (or adjusted deficit excess, in the case of fiscal year 1986). Such report shall be based on the estimates, determinations, and specifications of the Directors and shall utilize the budget base, criteria, and guidelines set forth in subsection (a)(6) and in sections 255, 256, and 257.

(2) CONTENTS OF REPORT.—The report of the Comptroller General under this subsection shall—

(A) provide for the determination of reductions in the manner specified in subsection (a)(3); and

(B) contain estimates, determinations, and specifications for all of the items contained in the report submitted by the Directors under subsection (a).

Such report shall explain fully any differences between the contents of such report and the report of the Directors.

(c) REVISED ESTIMATES, DETERMINATIONS, AND REPORTS.—

(1) REPORT BY OMB AND CBO.—On October 5 of the fiscal year (except in the case of the fiscal year 1986), the Directors shall submit to the Comptroller General a revised report—

(A) indicating whether and to what extent, as a result of laws enacted and regulations promulgated after the submission of their initial report under subsection (a), the excess deficit (adjusted in accordance with subsection (a)(3)(A)(ii), in the case of fiscal year 1986) identified in the report submitted under such subsection has been eliminated, reduced, or increased, and

(B) adjusting the determinations made under subsection (a) to the extent necessary.

The revised report submitted under this paragraph shall contain estimates, determinations, and specifications for all of the items contained in the initial report and authorized under subsection (d)(3)(D)(i) and shall be based on the same economic and technical assumptions, employ the same methodologies, and utilize the same definition of the budget base and the same criteria and guidelines as those used in the report submitted by the Directors under subsection (a) (except that subdivision (II) of paragraph (6)(D)(i) of such subsection shall not apply), and shall provide for the determination of reductions in the manner specified in subsection (a)(3).

(2) REPORT BY COMPTROLLER GENERAL.—

(A) On October 10 of the fiscal year (except in the case of the fiscal year 1986), the Comptroller General shall submit to the President and the Congress a report revising the report submitted by the Comptroller General under subsection (b),

adjusting the estimates, determinations, and specifications contained in that report to the extent necessary in the light of the revised report submitted to him by the Directors under paragraph (1) of this subsection.

(B) The revised report of the Comptroller General under this paragraph shall provide for the determination of reductions as specified in subsection (a)(3) and shall contain all of the estimates, determinations, and specifications required (in the case of the report submitted under subsection (b)) pursuant to subsection (b)(2)(B).

(d) SEQUESTRATION OF DEFENSE PROGRAMS.—

(1) DETERMINATION OF UNIFORM PERCENTAGE.—The total amount of reductions in outlays under defense programs required for a fiscal year under subsection (a)(3)(B) after the reduction under subsection (a)(3)(E)(i) shall be calculated as a percentage of the total amount of outlays for the fiscal year estimated to result from new budget authority and unobligated balances for defense programs.

(2) SEQUESTRATION OF NEW BUDGET AUTHORITY AND UNOBLIGATED BALANCES.—

(A) Sequestration to achieve the remaining reduction in outlays under defense programs shall be made by reducing new budget authority and unobligated balances (if any) in each program, project, or activity under accounts within defense programs by the percentage determined under paragraph (1), computed on the basis of the combined outlay rate for new budget authority and unobligated balances for such program, project, or activity determined under subparagraph (B).

(B)(i) The combined outlay rate for new budget authority and unobligated balances for a program, project, or activity shall be determined by the Directors from data then available to them as supplemented by additional data from the

heads of the appropriate departments or agencies of the executive branch. If the outlay rate for unobligated balances is not available for any program, project, or activity, the outlay rate used shall be the outlay rate for new budget authority.

(ii) The weighted average (by budget authority) for the combined outlay rates so determined for all the programs, projects, and activities within an account shall be compared to the historical outlay rates for that account previously estimated by the Directors. If the Directors determine that it is necessary to make the combined outlay rate for a program, project, or activity as determined under the first sentence of this subparagraph consistent with the historical rates for such account, they may adjust the outlay rate for such program project, or activity.

(C) For the purposes of this paragraph:

(i) The term "outlay rate", with respect to any program, project, or activity, means—

(I) the ratio of outlays resulting in the fiscal year involved from new budget authority for such program, project, or activity to such new budget authority; or

(II) the ratio of outlays resulting in the fiscal year involved from unobligated balances for such program, project, or activity to such unobligated balances.

(ii) The term "combined outlay rate", with respect to any program, project, or activity, means the weighted average (by budget authority) of the ratios determined under subclauses (I) and (II) of clause (i) for such program, project, or activity.

(3) SEQUESTRATION FROM NATIONAL DEFENSE ACCOUNTS THROUGH TERMINATION OR MODIFICATION OF EXISTING CONTRACTS.—

(A)(i) Subject to the provisions of this paragraph, the President, with respect to any fiscal year, may provide for—

(I) the termination or modification of an existing contract within any program, project, or activity within an account within major functional category 050; and

(II) the crediting, to the amount of new budget authority and unobligated balances otherwise required to be reduced from such program, project, or activity, of the net reduction achieved for the appropriate fiscal year by such termination or modification, based upon the combined outlay rate for such program, project, or activity determined under paragraph (2)(B).

(ii) The remaining required outlay reductions in such program, project, or activity shall be achieved by sequestering new budget authority and unobligated balances based upon the combined outlay rate for such program, project, or activity determined under paragraph (2)(B).

(B) Not later than September 5 of the calendar year in which the fiscal year begins (January 15 in the case of fiscal year 1986), the President shall transmit to the Comptroller General and the Committees on Armed Services and on Appropriations of the Senate and House of Representatives and make available to the Directors a report concerning the contracts proposed to be terminated or modified under this paragraph for such fiscal year. The report shall—

(i) identify the contracts proposed to be terminated or modified and the proposed

date of termination or modification of each such contract;

(ii) identify the anticipated outlay savings for the fiscal year involved and the anticipated reduction in obligated balances with respect to each such proposed termination or modification, together with an explanation of the relationship between the obligated balances that could be cancelled and the estimated outlay savings resulting therefrom;

(iii) provide documentation of the anticipated savings in outlays and obligated balances; and

(iv) provide a complete rationale for the effect of each proposed termination or modification on the contract concerned and on the program, project, or activity involved.

(C) Not later than September 30 of the calendar year in which the fiscal year begins (February 15 in the case of fiscal year 1986), the Comptroller General shall certify to the President and the Congress, with respect to each contract which is proposed to be terminated or modified—

(i) whether the Comptroller General is able to verify that the estimated outlay savings for the fiscal year involved are achievable and would be achieved in that year; and

(ii) whether the ratio between the projected outlay savings and the anticipated reduction in obligated balances is reasonable.

(D)(i) In the case of a fiscal year other than fiscal year 1986, each proposed contract termination or modification described in subparagraph (A) with respect to which the certification by the Comptroller General under subparagraph (C) is affirmative (with respect to both clause (i) and clause (ii) of such subparagraph) shall be included in the report of the Directors under subsection

(c)(1). The report shall include the information about each such contract described in subparagraph (B)(ii).

(ii) In the case of fiscal year 1986, each proposed contract termination or modification described in subparagraph (A) with respect to which the certification by the Comptroller General under subparagraph (C) is affirmative (with respect to both clause (i) and (ii) of such subparagraph) shall be included in the modification authorized by section 252(a)(6)(D)(iii) in the order issued by the President under section 252(a)(1) with respect to fiscal year 1986.

(iii) The authority of the President described in subparagraph (A) is not effective in the case of any proposed contract termination or modification with respect to which the certification by the Comptroller General under subparagraph (C) is not affirmative (with respect to both clause (i) and clause (ii) of such subparagraph).

(E) For any contract termination or modification proposed pursuant to this paragraph, the President shall certify to Congress, within thirty days after the effective date of the contract termination or modification, that the amounts proposed for deobligation under such contract have in fact been deobligated and cancelled.

(e) Dates for Submission of Reports and Issuance of Orders.—If the date specified for the submission of a report by the Directors or the Comptroller General under this section or for the issuance of an order by the President under section 252 falls on a Sunday or legal holiday, such report shall be submitted or such order issued on the following day.

(f) Printing of Reports.—Each report submitted under this section shall be printed in the Federal Register on the date it is issued; and the reports of the Comptroller General submitted to the Congress under subsections (b)

and (c)(2) shall be printed as documents of the House of Representatives and the Senate.

(g) EXCEPTION.—The preceding provisions of this section shall not apply if a declaration of war by the Congress is in effect.

SEC. 252. PRESIDENTIAL ORDER.

(a) ISSUANCE OF INITIAL ORDER.—

(1) IN GENERAL.—On September 1 following the submission of a report by the Comptroller General under section 251(b) which identifies an amount greater than $10,000,000,000 (zero in the case of fiscal years 1986 and 1991) by which the deficit for a fiscal year will exceed the maximum deficit amount for such fiscal year (or on February 1, 1986, in the case of the fiscal year 1986), the President, in strict accordance with the requirements of paragraph (3) and section 251(a)(3) and (4) and subject to the exemptions, exceptions, limitations, special rules, and definitions set forth in sections 255, 256, and 257, shall eliminate the full amount of the deficit excess (as adjusted by the Comptroller General in such report in accordance with section 251(a)(3)(A)(ii), in the case of fiscal year 1986) by issuing an order that (notwithstanding the Impoundment Control Act of 1974)—

(A) modifies or suspends the operation of each provision of Federal law that would (but for such order) require an automatic spending increase to take effect during such fiscal year, in such a manner as to prevent such increase from taking effect, or reduce such increase, in accordance with such report; and

(B) eliminates the remainder of such deficit excess (or adjusted deficit excess, in the case of fiscal year 1986) by sequestering new budget authority, unobligated balances, new loan guarantee commitments, new direct loan obligations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974,

and reducing obligation limitations, in accordance with such report—

(i) for funds provided in annual appropriation Acts, from each affected program, project, and activity (as set forth in the most recently enacted applicable appropriation Acts and accompanying committee reports for the program, project, or activity involved, including joint resolutions providing continuing appropriations and committee reports accompanying Acts referred to in such resolutions), applying the same reduction percentage as the percentage by which the account involved is reduced in the report submitted under section 251(b), or from each affected budget account if the program, project, or activity is not so set forth, and

(ii) for funds not provided in annual appropriation Acts, from each budget account activity as identified in the program and financing schedules contained in the appendix to the Budget of the United States Government for that fiscal year, applying the same reduction percentage as the percentage by which the account is reduced in such report.

(2) SPECIAL SEQUESTRATION PROCEDURES FOR NATIONAL DEFENSE FOR FISCAL YEAR 1986.—

(A) IN GENERAL.—Notwithstanding subparagraph (B)(i) of paragraph (1), the order issued by the President under paragraph (1) with respect to fiscal year 1986 shall sequester, from each program, project, or activity within an account within major functional category 050, such amounts of new budget authority and unobligated balances as are specified (in accordance with section 251(a)(3)(E)(ii)) in the report submitted by the Comptroller General under section 251(b).

(B) FLEXIBILITY WITH RESPECT TO MILITARY PERSONNEL ACCOUNTS.—

(i) Notwithstanding subparagraph (B)(i) of paragraph (1), the order issued by the President under paragraph (1) with respect to fiscal year 1986 may, with respect to any military personnel account—

(I) exempt any program, project, or activity within such account from the order;

(II) provide for a lower uniform percentage to be applied to reduce any program, project, or activity within such account than would otherwise apply; or

(III) take actions described in both subclauses (I) and (II).

(ii) If the President uses the authority under clause (i), the total amount by which outlays are not reduced for fiscal year 1986 in military personnel accounts by reason of the use of such authority shall be determined. Reductions in outlays under defense programs in such total amount shall be achieved by a uniform percentage sequestration of new budget authority and unobligated balances in each program, project, and activity within each account within major functional category 050 other than those military personnel accounts for which the authority provided under clause (i) has been exercised, computed on the basis of the outlay rate for each such program, project, and activity determined under section 251(d).

(iii) The President may not use the authority provided by clause (i) unless he notifies the Comptroller General and the Congress on or before January 10, 1986, of the manner in which such authority will be exercised.

(C) FLEXIBILITY AMONG PROGRAMS, PROJECTS, AND ACTIVITIES WITHIN ACCOUNTS.—

(i) New budget authority and unobligated balances for any program, project, or activity within an account within major functional category 050 may be reduced under an order issued by the President under paragraph (1) for fiscal year 1986, subject to clauses (ii) and (iii) of this subparagraph, by up to two times the percentage otherwise applicable to the program, project, or activity (determined after any reduction under subparagraph (B)). To the extent such reductions are made under such an order, the President may provide in the order for an increase in new budget authority and unobligated balances for another program, project, or activity within the same account within major functional category 050 for fiscal year 1986, but such program, project, or activity may not be increased above the level in the base set forth in such order.

(ii) No order issued by the President under paragraph (1) for fiscal year 1986 may result in a base closure or realignment that would otherwise be subject to section 2687 of title 10, United States Code.

(iii) New budget authority and unobligated balances for any program, project, or activity within major functional category 050 for fiscal year 1986 which is 10 percent (or more) greater than the amount requested in the budget submitted by the President under section 1105 of title 31, United States Code, for fiscal year 1986 may not be reduced by more than the percentage applicable to the program, project, or activity (determined after any reduction under subparagraph (B)).

(3) ORDER TO BE BASED ON COMPTROLLER GENERAL'S REPORT.—The order must provide for reductions in the manner specified in section 251(a)(3), must incorporate the provisions of the report submitted under section 251(b), and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account, with the exception of the authority granted to the President for fiscal year 1986 with respect to defense programs pursuant to paragraph (2)(C).

(4) EFFECT OF SEQUESTRATION UNDER INITIAL ORDER.—Notwithstanding section 257(7), amounts sequestered under an order issued by the President under paragraph (1) for fiscal year 1987 or any subsequent fiscal year shall be withheld from obligation pending the issuance of a final order under subsection (b) and shall be permanently cancelled in accordance with such final order upon the issuance of such order.

(5) ACCOMPANYING MESSAGE.—At the time the actions described in the preceding provisions of this subsection with respect to any fiscal year are taken, the President shall transmit to both Houses of the Congress a message containing all the information required by section 251(a)(4) and further specifying in strict accordance with paragraph (3)—

(A) within each account, for each program, project, and activity, or budget account activity, the base from which each sequestration or reduction is taken and the amounts which are to be sequestered or reduced for each such program, project, and activity or budget account activity; and

(B) such other supporting details as the President may determine to be appropriate.

Upon receipt in the Senate and the House of Representatives, the message (and any accompanying proposals made under subsection (c)) shall be referred to all committees with jurisdiction over programs, projects, and activities affected by the order.

(6) EFFECTIVE DATE OF INITIAL ORDER.—

(A) FISCAL YEAR 1986.—The order issued by the President under paragraph (1) with respect to the fiscal year 1986 shall be effective as of March 1, 1986.

(B) FISCAL YEARS 1987–1991.—The order issued by the President under paragraph (1) with respect to the fiscal year 1987 or any subsequent fiscal year shall be effective as of October 1 of such fiscal year (and the President shall withhold from obligation as provided in paragraph (4), pending the issuance of his final order under subsection (b), any amounts that are to be sequestered or reduced under such order).

(C) TREATMENT OF AUTOMATIC SPENDING INCREASES.—

(i) FISCAL YEAR 1986.—Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be first paid during the period beginning with the date of the enactment of this joint resolution and ending with the effective date of an order issued by the President under paragraph (1) for the fiscal year 1986 shall be suspended until such order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such order provides that automatic spending increases shall be reduced to zero during such fiscal year, the increases suspended

pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled. If such order provides for the payment of automatic spending increases during such fiscal year in amounts that are less than would have been paid but for such order, or provides for the payment of the full amount of such increases, the increases suspended pursuant to such sentence shall be restored to the extent necessary to pay such reduced or full increases, and lump-sum payments in the amounts necessary to pay such reduced or full increases shall be made, for the period for which such increases were suspended pursuant to this clause.

(ii) FISCAL YEARS 1987–1991.—Notwithstanding any other provision of law, any automatic spending increase that would (but for this clause) be first paid during the period beginning with the first day of such fiscal year and ending with the date on which a final order is issued pursuant to subsection (b) shall be suspended until such final order becomes effective, and the amounts that would otherwise be expended during such period with respect to such increases shall be withheld. If such final order provides that automatic spending increases shall be reduced to zero during such fiscal year, the increases suspended pursuant to the preceding sentence and any legal rights thereto shall be permanently cancelled. If such final order provides for the payment of automatic spending increases during such fiscal year in amounts that are less than would have been paid but for such final order, or provides for the payment of the full amount of such increases, the increases sus-

pended pursuant to such sentence shall be restored to the extent necessary to pay such reduced or full increases, and lump-sum payments in the amounts necessary to pay such reduced or full increases shall be made, for the period for which such increases were suspended pursuant to this clause.

(iii) PROHIBITION AGAINST RECOUPMENT.—Notwithstanding clauses (i) and (ii), if an amount required by either such clause to be withheld is paid, no recoupment shall be made against an individual to whom payment was made.

(iv) EFFECT OF LUMP-SUM PAYMENTS ON NEEDS-RELATED PROGRAMS.—Lump-sum payments made under the last sentence of clause (i) or clause (ii) shall not be considered as income or resources or otherwise taken into account in determining the eligibility of any individual for aid, assistance, or benefits under any Federal or federally-assisted program which conditions such eligibility to any extent upon the income or resources of such individual or his or her family or household, or in determining the amount or duration of such aid, assistance, or benefits.

(D) SPECIAL RULES FOR FISCAL YEAR 1986.—(i) For purposes of applying this section and section 251 with respect to the fiscal year 1986—

(I) the order issued by the President under paragraph (1) of this subsection shall be considered the final order of the President under this section; and

(II) the Committees on Appropriations of the House of Representatives and the Senate may, after consultation with each other, define the term "program, project, and activity", and report to their respective Houses,

with respect to matters within their jurisdiction, and the order issued by the President shall sequester funds in accordance with such definition.

(ii) If the Comptroller General declares in the report issued under section 251(b) for fiscal year 1986 that as a result of laws enacted and regulations promulgated after the date of the enactment of this joint resolution and prior to the issuance of such report the excess deficit for the fiscal year (adjusted in accordance with section 251(a)(3)(A)(ii) has been eliminated, the order issued under this subsection for the fiscal year shall so state (and shall make available for obligation and expenditure any amounts withheld pursuant to subparagraph (C)(i) of this paragraph).

(iii) The order issued by the President under paragraph (1) with respect to fiscal year 1986 shall be modified before the effective date for such order prescribed under subparagraph (A) to include in the order the changes in budget authority and unobligated balances, and related changes in outlay reductions, authorized for such fiscal year under section 251(d)(3)(D)(ii).

(b) Issuance of Final Order.—

(1) In general.—On October 15 of the fiscal year (except in the case of the fiscal year 1986), after the submission of the revised report submitted by the Comptroller General under section 251(c)(2), the President shall issue a final order under this section to eliminate the full amount of the deficit excess as identified by the Comptroller General in the revised report submitted under section 251(c)(2) but only to the extent and in the manner provided in such report. The order issued under this subsection—

(A) shall include the same reductions and sequestrations as the initial order issued under

subsection (a), adjusted to the extent necessary to take account of any changes in relevant amounts or percentages determined by the Comptroller General in the revised report submitted under section 251(c)(2).

(B) shall make such reductions and sequestrations in strict accordance with the requirements of section 251(a)(3) and (4), and

(C) shall utilize the same criteria and guidelines as those which were used in the issuance of such initial order under subsection (a).

The provisions of subsection (a)(3) shall apply to the revised report submitted under section 251(c)(2) and to the order issued under this subsection in the same manner as such provisions apply to the initial report issued under section 251(b) and to the order issued under subsection (a).

(2) ORDER REQUIRED IF EXCESS DEFICIT IS ELIMINATED.—If the Comptroller General issues a revised report under section 251(c)(2) stating that as a result of laws enacted and regulations promulgated after the submission of the initial report of the Comptroller General under section 251(b) the excess deficit for a fiscal year (adjusted in accordance with section 251(a)(3)(A)(ii), in the case of fiscal year 1986) has been eliminated, the order issued under this subsection shall so state and shall make available for obligation and expenditure any amounts withheld pursuant to subsection (a)(4) or (a)(6)(C).

(3) EFFECTIVE DATE OF FINAL ORDER.—

(A) Except as provided in subsection (a)(6)(A), the final order issued by the President under paragraph (1) shall become effective on the date of its issuance, and shall supersede the order issued under subsection (a)(1).

(B) Any modification or suspension by such order of the operation of a provision of law that would (but for such order) require an automatic

spending increase to take effect during the fiscal year shall apply for the one-year period beginning with the date on which such automatic increase would have taken effect during such fiscal year (but for such order).

(c) PROPOSAL OF ALTERNATIVES BY THE PRESIDENT.—A message transmitted pursuant to subsection (a)(5) with respect to a fiscal year may be accompanied by a proposal setting forth in full detail alternative ways to reduce the deficit for such fiscal year to an amount not greater than the maximum deficit amount for such fiscal year.

(d) EXISTING PROGRAMS, PROJECTS, AND ACTIVITIES NOT TO BE ELIMINATED.—No action taken by the President under subsection (a) or (b) of this section shall have the effect of eliminating any program, project, or activity of the Federal Government.

(e) RELATIVE BUDGET PRIORITIES NOT TO BE ALTERED.—Nothing in the preceding provisions of this section shall be construed to give the President new authority to alter the relative priorities in the Federal budget that are established by law, and no person who is or becomes eligible for benefits under any provision of law shall be denied eligibility by reason of any order issued under this part.

SEC. 253. COMPLIANCE REPORT BY COMPTROLLER GENERAL.

On or before November 15 of each fiscal year (or on or before April 1, 1986, in the case of the fiscal year 1986), the Comptroller General shall submit to the Congress and the President a report on the extent to which the President's order issued under section 252(b) for such fiscal year complies with all of the requirements contained in section 252, either certifying that the order fully and accurately complies with such requirements or indicating the respects in which it does not.

SEC. 254. CONGRESSIONAL ACTION.

(a) SPECIAL PROCEDURES IN THE EVENT OF A RECESSION.—

(1) IN GENERAL.—The Director of the Congressional Budget Office shall notify the Congress at any time if—

(A) during the period consisting of the quarter during which such notification is given, the quarter preceding such notification, and the four quarters following such notification, such Office or the Office of Management and Budget has determined that real economic growth is projected or estimated to be less than zero with respect to each of any two consecutive quarters within such period, or

(B) the Department of Commerce preliminary reports of actual real economic growth (or any subsequent revision thereof) indicate that the rate of real economic growth for each of the most recent reported quarter and the immediately preceding quarter is less than one percent.

Upon such notification the Majority Leader of each House shall introduce a joint resolution (in the form set forth in paragraph (2)) declaring that the conditions specified in this paragraph are met and suspending the relevant provisions of this title for the remainder of the current fiscal year or for the following fiscal year or both.

(2) FORM OF JOINT RESOLUTION.—

(A) The matter after the resolving clause in any joint resolution introduced pursuant to paragraph (1) shall be as follows: "That the Congress declares that the conditions specified in section 254(a)(1) of the Balanced Budget and Emergency Deficit Control Act of 1985 are met; and—

"(1) the provisions of sections 3(7), 301(i), 302(f), 304(b), and 311(a) of the Congressional Budget and Impoundment Control Act of 1974, section 1106(c) of title 31, United States Code, and part C of the Balanced Budget and Emergency Deficit Control Act of 1985 are

suspended for the remainder of the current fiscal year, and

"(2) the provisions of sections 3(7), 301(i), 304(b), and 311(a) (insofar as it relates to section 3(7)) of the Congressional Budget and Impoundment Control Act of 1974, sections 302(f) and 311(a) (except insofar as it relates to section 3(7)) of that Act (but only if a concurrent resolution on the budget under section 301 of that Act, for the fiscal year following the current fiscal year, has been agreed to prior to the introduction of this joint resolution), sections 1105(f) and 1106(c) of title 31, United States Code, and part C of the Balanced Budget and Emergency Deficit Control Act of 1985 are suspended for the fiscal year following the current fiscal year.

This joint resolution shall not have the effect of suspending any final order which was issued for the current fiscal year under section 252(b) of the Balanced Budget and Emergency Deficit Control Act of 1985 if such order was issued before the date of the enactment of this joint resolution.".

(B) The title of the joint resolution shall be "Joint resolution suspending certain provisions of law pursuant to section 254(a)(2) of the Balanced Budget and Emergency Deficit Control Act of 1985."; and the joint resolution shall not contain any preamble.

(3) COMMITTEE ACTION.—Each joint resolution introduced pursuant to paragraph (1) shall be referred to the Committee on the Budget of the House involved; and such Committee shall report the joint resolution to its House without amendment on or before the fifth day on which such House is in session after the date on which the joint resolution is introduced. If the Committee fails to report the joint resolution within the five-day period referred to in the preced-

ing sentence, it shall be automatically discharged from further consideration of the joint resolution, and the joint resolution shall be placed on the appropriate calendar.

(4) CONSIDERATION OF JOINT RESOLUTION.—

(A) A vote on final passage of a joint resolution reported to a House of the Congress or discharged pursuant to paragraph (3) shall be taken on or before the close of the fifth calendar day of session of such House after the date on which the joint resolution is reported to such House or after the Committee has been discharged from further consideration of the joint resolution. If prior to the passage by one House of a joint resolution of that House, that House receives the same joint resolution from the other House, then—

(i) the procedure in that House shall be the same as if no such joint resolution had been received from the other House, but

(ii) the vote on final passage shall be on the joint resolution of the other House.

When the joint resolution is agreed to, the Clerk of the House of Representatives (in the case of a House joint resolution agreed to in the House of Representatives) or the Secretary of the Senate (in the case of a Senate joint resolution agreed to in the Senate) shall cause the joint resolution to be engrossed, certified, and transmitted to the other House of the Congress as soon as practicable.

(B)(i) A motion in the House of Representatives to proceed to the consideration of a joint resolution under this paragraph shall be highly privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(ii) Debate in the House of Representatives on a joint resolution under this paragraph shall be limited to not more than five hours, which shall be divided equally between those favoring and those opposing the joint resolution. A motion to postpone, made in the House of Representatives with respect to the consideration of a joint resolution under this paragraph, and a motion to proceed to the consideration of other business, shall not be in order. A motion further to limit debate shall not be debatable. It shall not be in order to move to table or to recommit a joint resolution under this paragraph or to move to reconsider the vote by which the joint resolution is agreed to or disagreed to.

(iii) All appeals from the decisions of the Chair relating to the application of the Rules of the House of Representatives to the procedure relating to a joint resolution under this paragraph shall be decided without debate.

(iv) Except to the extent specifically provided in the preceding provisions of this subsection or in subparagraph (D), consideration of a joint resolution under this subparagraph shall be governed by the Rules of the House of Representatives.

(C)(i) A motion in the Senate to proceed to the consideration of a joint resolution under this paragraph shall be privileged and not debatable. An amendment to the motion shall not be in order, nor shall it be in order to move to reconsider the vote by which the motion is agreed to or disagreed to.

(ii) Debate in the Senate on a joint resolution under this paragraph, and all debatable motions and appeals in connection therewith, shall be limited to not more than five hours. The time shall be equally divided between, and controlled

by, the majority leader and the minority leader or their designees.

(iii) Debate in the Senate on any debatable motion or appeal in connection with a joint resolution under this paragraph shall be limited to not more than one hour, to be equally divided between, and controlled by, the mover and the manager of the joint resolution, except that in the event the manager of the joint resolution is in favor of any such motion or appeal, the time in opposition thereto shall be controlled by the minority leader or his designee.

(iv) A motion in the Senate to further limit debate on a joint resolution under this paragraph is not debatable. A motion to table or to recommit a joint resolution under this paragraph is not in order.

(D) No amendment to a joint resolution considered under this paragraph shall be in order in either the House of Representatives or the Senate.

(b) CONGRESSIONAL RESPONSE TO PRESIDENTIAL ORDER.—

(1) REPORTING OF RESOLUTIONS, AND RECONCILIATION BILLS AND RESOLUTIONS, IN THE SENATE.—

(A) COMMITTEE ALTERNATIVES TO PRESIDENTIAL ORDER.—Within two days after the submission of a report by the Comptroller General under section 251(c)(2), each standing committee of the Senate may submit to the Committee on the Budget of the Senate information of the type described in section 301(d) of the Congressional Budget Act of 1974 with respect to alternatives to the order envisioned by such report insofar as such order affects laws within the jurisdiction of the committee.

(B) INITIAL BUDGET COMMITTEE ACTION.—Not later than two days after issuance of a final order by the President under section 252(b) with

respect to a fiscal year, the Committee on the Budget of the Senate may report to the Senate a resolution. The resolution may affirm the impact of the order issued under such section, in whole or in part. To the extent that any part of the order is not affirmed, the resolution shall state which parts are not affirmed and shall contain instructions to committees of the Senate of the type referred to in section 310(a) of the Congressional Budget Act of 1974, sufficient to achieve at least the total level of deficit reduction contained in those sections which are not affirmed.

(C) RESPONSE OF COMMITTEES.—Committees instructed pursuant to subparagraph (B), or affected thereby, shall submit their responses to the Budget Committee no later than 10 days after the resolution referred to in subparagraph (B) is agreed to, except that if only one such Committee is so instructed such Committee shall, by the same date, report to the Senate a reconciliation bill or reconciliation resolution containing its recommendations in response to such instructions. A committee shall be considered to have complied with all instructions to it pursuant to a resolution adopted under subparagraph (B) if it has made recommendations with respect to matters within its jurisdiction which would result in a reduction in the deficit at least equal to the total reduction directed by such instructions.

(D) BUDGET COMMITTEE ACTION.—Upon receipt of the recommendations received in response to a resolution referred to in subparagraph (B), the Budget Committee shall report to the Senate a reconciliation bill or reconciliation resolution, or both, carrying out all such recommendations without any substantive revisions. In the event that a committee instructed in a resolution referred to in subparagraph (B) fails to submit any

recommendation (or, when only one committee is instructed, fails to report a reconciliation bill or resolution) in response to such instructions, the Budget Committee shall include in the reconciliation bill or reconciliation resolution reported pursuant to this subparagraph legislative language within the jurisdiction of the noncomplying committee to achieve the amount of deficit reduction directed in such instructions.

(E) Point of order.—It shall not be in order in the Senate to consider any reconciliation bill or reconciliation resolution reported under subparagraph (D) with respect to a fiscal year, any amendment thereto, or any conference report thereon if—

(i) the enactment of such bill or resolution as reported;

(ii) the adoption and enactment of such amendment; or

(iii) the enactment of such bill or resolution in the form recommended in such conference report,

would cause the amount of the deficit for such fiscal year to exceed the maximum deficit amount for such fiscal year, unless the report submitted under section 251(c)(1) projects negative real economic growth for such fiscal year, or for each of any two consecutive quarters during such fiscal year.

(F) Treatment of certain amendments.—In the Senate, an amendment which adds to a resolution reported under subparagraph (B) an instruction of the type referred to in such subparagraph shall be in order during the consideration of such resolution if such amendment would be in order but for the fact that it would be held to be nongermane on the basis that the instruction constitutes new matter.

(G) DEFINITION.—For purposes of subparagraphs (A), (B), and (C), the term "day" shall mean any calendar day on which the Senate is in session.

(2) PROCEDURES.—

(A) IN GENERAL.—Except as provided in subparagraph (B), in the Senate the provisions of sections 305 and 310 of the Congressional Budget Act of 1974 for the consideration of concurrent resolutions on the budget and conference reports thereon shall also apply to the consideration of resolutions, and reconciliation bills and reconciliation resolutions reported under this paragraph and conference reports thereon.

(B) LIMIT ON DEBATE.—Debate in the Senate on any resolution reported pursuant to paragraph (1)(B), and all amendments thereto and debatable motions and appeals in connection therewith, shall be limited to 10 hours.

(C) LIMITATION ON AMENDMENTS.—Section 310(d)(2) of the Congressional Budget Act shall apply to reconciliation bills and reconciliation resolutions reported under this subsection.

(D) BILLS AND RESOLUTIONS RECEIVED FROM THE HOUSE.—Any bill or resolution received in the Senate from the House, which is a companion to a reconciliation bill or reconciliation resolution of the Senate for the purposes of this subsection, shall be considered in the Senate pursuant to the provisions of this subsection.

(E) DEFINITION.—For purposes of this subsection, the term "resolution" means a simple, joint, or concurrent resolution.

(c) CERTAIN RESOLUTIONS TREATED AS RECONCILIATION BILLS.—Resolutions described in subsection (b) of this section and bills reported as a result thereof shall be considered in the Senate to be reconciliation bills or resolutions for purposes of the Congressional Budget Act of 1974.

SEC. 255. EXEMPT PROGRAMS AND ACTIVITIES.

(a) SOCIAL SECURITY BENEFITS AND TIER I RAILROAD RETIREMENT BENEFITS.—Increases in benefits payable under the old-age, survivors, and disability insurance program established under title II of the Social Security Act, or in benefits payable under section 3(a), 3(f)(3), 4(a), or 4(f) of the Railroad Retirement Act of 1974, shall not be considered "automatic spending increases" for purposes of this title; and no reduction in any such increase or in any of the benefits involved shall be made under any order issued under this part.

(b) VETERANS PROGRAMS.—The following programs shall be exempt from reduction under any order issued under this part:

Veterans' compensation (36–0153–0–1–701); and

Veterans' pensions (36–0154–0–1–701).

(c) NET INTEREST.—No reduction of payments for net interest (all of major functional category 900) shall be made under any order issued under this part.

(d) EARNED INCOME TAX CREDIT.—Payments to individuals made pursuant to section 32 of the Internal Revenue Code of 1954 shall be exempt from reduction under any order issued under this part.

(e) OFFSETTING RECEIPTS AND COLLECTIONS.—Offsetting receipts and collections shall not be reduced under any order issued under this part.

(f) CERTAIN PROGRAM BASES.—Outlays for programs specified in paragraph (1) of section 257 shall be subject to reduction only in accordance with the procedures established in section 251(a)(3)(C) and 256(b).

(g) OTHER PROGRAMS AND ACTIVITIES.—

(1) The following budget accounts and activities shall be exempt from reduction under any order issued under this part:

Activities resulting from private donations, bequests, or voluntary contributions to the Government;

Alaska Power Administration, Operations and maintenance (89–0304–0–1–271);

Appropriations for the District of Columbia (to the extent they are appropriations of locally raised funds);

Bonneville Power Administration fund and borrowing authority established pursuant to section 13 of Public Law 93-454 (1974), as amended (89-4045-0-3-271);

Bureau of Indian Affairs miscellaneous trust funds, tribal trust funds (14-9973-0-7-999);

Claims, defense (97-0102-0-1-051);

Claims, judgments, and relief acts (20-1895-0-1-806);

Coinage profit fund (20-5811-0-2-803);

Compensation of the President (11-0001-0-1-802);

Eastern Indian land claims settlement fund (14-2202-0-1-806);

Exchange stabilization fund (20-4444-0-3-155);

Federal payment to the railroad retirement account (60-0113-0-1-601);

Foreign military sales trust fund (11-8242-0-7-155);

Health professions graduate student loan insurance fund (Health Education Assistance Loan Program) (75-4305-0-3-553);

Intragovernmental funds, including those from which the outlays are derived primarily from resources paid in from other government accounts, except to the extent such funds are augmented by direct appropriations for the fiscal year during which an order is in effect;

Payment of Vietnam and USS Pueblo prisoner-of-war claims (15-0104-0-1-153);

Payment to civil service retirement and disability fund (24-0200-0-1-805);

Payments to copyright owners (03-5175-0-2-376);

Payments to health care trust funds (75-0580-0-1-572);

Payments to military retirement fund (97-0040-0-1-054);

Payments to social security trust funds (75-0404-0-1-571);

Payments to state and local government fiscal assistance trust fund (20-2111-0-1-851);

Payments to the foreign service retirement and disability fund (11-1036-0-1-153 and 19-0540-0-1-153);

Payments to trust funds from excise taxes or other receipts properly creditable to such trust funds;

Postal service fund (18-4020-0-3-372);

Salaries of Article III judges;

Soldiers and Airmen's Home, payment of claims (84-8930-0-7-705);

Southeastern Power Administration, Operations and maintenance (89-0302-0-1-271);

Southwestern Power Administration, Operations and maintenance (89-0303-0-1-271);

Tennessee Valley Authority fund, except nonpower programs and activities (64-4110-0-3-999);

Western Area Power Administration, Construction, rehabilitation, operations, and maintenance (89-5068-0-2-271); and

Western Area Power Administration, Colorado River basins power marketing fund (89-4452-0-3-271).

(2) Prior legal obligations of the Government in the following budget accounts and activities shall be exempt from any order issued under this part:

Agency for International Development, Housing, and other credit guarantee programs (72-4340-0-3-151);

Agricultural credit insurance fund (12-4140-0-3-351);

Biomass energy development (20–0114–0–1–271);

Check forgery insurance fund (20–4109–0–3–803);

Community development grant loan guarantees (86–0162–0–1–451);

Credit union share insurance fund (25–4468–0–3–371);

Economic development revolving fund (13–4406–0–3–452);

Employees life insurance fund (24–8424–0–8–602);

Energy security reserve (Synthetic Fuels Corporation) (20–0112–0–1–271);

Export-Import Bank of the United States, Limitation of program activity (83–4027–0–3–155);

Federal Aviation Administration, Aviation insurance revolving fund (69–4120–0–3–402);

Federal Crop Insurance Corporation fund (12–4085–0–3–351);

Federal Deposit Insurance Corporation (51–8419–0–8–371);

Federal Emergency Management Agency, National flood insurance fund (58–4236–0–3–453);

Federal Emergency Management Agency, National insurance development fund (58–4235–0–3–451);

Federal Housing Administration fund (86–4070–0–3–371);

Federal Savings and Loan Insurance Corporation fund (82–4037–0–3–371);

Federal ship financing fund (69–4301–0–3–403);

Federal ship financing fund, fishing vessels (13–4417–0–3–376);

Geothermal resources development fund (89–0206–0–1–271);

Government National Mortgage Association, Guarantees of mortgage-backed securities (86-4238-0-3-371);

Health education loans (75-4307-0-3-553);

Homeowners assistance fund, Defense (97-4090-0-3-051);

Indian loan guarantee and insurance fund (14-4410-0-3-452);

International Trade Administration, Operations and administration (13-1250-0-1-376);

Low-rent public housing, Loans and other expenses (86-4098-0-3-604);

Maritime Administration, War-risk insurance revolving fund (69-4302-0-3-403);

Overseas Private Investment Corporation (71-4030-0-3-151);

Pension Benefit Guaranty Corporation fund (16-4204-0-3-601);

Rail service assistance (69-0122-0-1-401);

Railroad rehabilitation and improvement financing fund (69-4411-0-3-401);

Rural development insurance fund (12-4155-0-3-452);

Rural electric and telephone revolving fund (12-4230-8-3-271);

Rural housing insurance fund (12-4141-0-3-371);

Small Business Administration, Business loan and investment fund (73-4154-0-3-376);

Small Business Administration, Lease guarantees revolving fund (73-4157-0-3-376);

Small Business Administration, Pollution control equipment contract guarantee revolving fund (73-4147-0-3-376);

Small Business Administration, Surety bond guarantees revolving fund (73-4156-0-3-376);

Veterans Administration, Loan guaranty revolving fund (36-4025-0-3-704);

Veterans Administration, National service life insurance fund (36–8132–0–7–701);

Veterans Administration, Service-disabled veterans insurance fund (36–4012–0–3–701);

Veterans Administration, Servicemen's group life insurance fund (36–4009–0–3–701);

Veterans Administration, United States Government life insurance fund (36–8150–0–7–701);

Veterans Administration, Veterans insurance and indemnities (36–0120–0–1–701);

Veterans Administration, Veterans reopened insurance fund (36–4010–0–3–701); and

Veterans Administration, Veterans special life insurance fund (36–8455–0–8–701).

(h) LOW-INCOME PROGRAMS.—The following programs shall be exempt from reduction under any order issued under this part:

Aid to families with dependent children (75–0412–0–1–609);

Child nutrition (12–3539–0–1–605);

Food stamp programs (12–3505–0–1–605 and 12–3550–0–1–605);

Grants to States for Medicaid (75–0512–0–1–551);

Supplemental Security Income Program (75–0406–0–1–609); and

Women, infants, and children program (12–3510–0–1–605).

(i) IDENTIFICATION OF PROGRAMS.—For purposes of subsections (g) and (h), programs are identified by the designated budget account identification code numbers set forth in the Budget of the United States Government, 1986—Appendix.

SEC. 256. EXCEPTIONS, LIMITATIONS, AND SPECIAL RULES.

(a) EFFECT OF REDUCTIONS AND SEQUESTRATIONS.—

(1) REDUCTIONS IN AUTOMATIC SPENDING INCREASES.—Notwithstanding any other provision of law, any change in the Consumer Price Index or any other index measuring costs, prices, or wages (or in

any component of any such index), under a program listed in section 257(1), that is not taken into account for purposes of determining the amount of an automatic spending increase (if any) under such program for a fiscal year for which an order is issued under section 252 shall not be taken into account for purposes of determining any automatic spending increase during any fiscal year thereafter.

(2) SEQUESTRATIONS.—Any amount of new budget authority, unobligated balances, obligated balances, new loan guarantee commitments, new direct loan obligations, spending authority (as defined in section 401(c)(2) of the Congressional Budget Act of 1974), or obligation limitations which is sequestered or reduced pursuant to an order issued under section 252 is permanently cancelled, with the exception of amounts sequestered in special or trust funds, which shall remain in such funds and be available in accordance with and to the extent permitted by law, including the provisions of this Act.

(b) TREATMENT OF FEDERAL ADMINISTRATIVE EXPENSES.—

(1) Notwithstanding any other provision of this title, administrative expenses incurred by the departments and agencies, including independent agencies, of the Federal Government in connection with any program, project, activity, or account shall be subject to reduction pursuant to an order issued under section 252, without regard to any exemption, exception, limitation, or special rule which is otherwise applicable with respect to such program, project, activity, or account under this part.

(2) Notwithstanding any other provision of law, administrative expenses of any program, project, activity, or account which is self-supporting and does not receive appropriations shall be subject to reduction under a sequester order, unless specifically exempted in this joint resolution.

(3) Payments made by the Federal Government to reimburse or match administrative costs incurred by a State or political subdivision under or in connection with any program, project, activity, or account shall not be considered administrative expenses of the Federal Government for purposes of this section, and shall be subject to reduction or sequestration under this part to the extent (and only to the extent) that other payments made by the Federal Government under or in connection with that program, project, activity, or account are subject to such reduction or sequestration; except that Federal payments made to a State as reimbursement of administrative costs incurred by such State under or in connection with the unemployment compensation programs specified in subsection (h)(1) shall be subject to reduction or sequestration under this part notwithstanding the exemption otherwise granted to such programs under that subsection.

(c) EFFECT OF ORDERS ON THE GUARANTEED STUDENT LOAN PROGRAM.—(1) Any reductions which are required to be achieved from the student loan programs operated pursuant to part B of title IV of the Higher Education Act of 1965, as a consequence of an order issued pursuant to section 252, shall be achieved only from loans described in paragraphs (2) and (3) by the application of the measures described in such paragraphs.

(2) For any loan made during the period beginning on the date that an order issued under section 252 takes effect with respect to a fiscal year and ending at the close of such fiscal year, the rate used in computing the special allowance payment pursuant to section 438(b)(2)(A)(iii) of such Act for each of the first four special allowance payments for such loan shall be adjusted by reducing such rate by the lesser of—

(A) 0.40 percent, or

(B) the percentage by which the rate specified in such section exceeds 3 percent.

(3) For any loan made during the period beginning on the date that an order issued under section 252 takes effect with respect to a fiscal year and ending at the close of such fiscal year, the origination fee which is authorized to be collected pursuant to section 438(c)(2) of such Act shall be increased by 0.50 percent.

(d) SPECIAL RULES FOR MEDICARE PROGRAM.—

(1) MAXIMUM PERCENTAGE REDUCTION IN INDIVIDUAL PAYMENT AMOUNTS.—The maximum permissible reduction for the health insurance programs under title XVIII of the Social Security Act for any fiscal year, pursuant to an order issued under section 252, consists only of a reduction of—

(A) 1 percent in the case of fiscal year 1986, and

(B) 2 percent in the case of any subsequent fiscal year,

in each separate payment amount otherwise made for a covered service under those programs without regard to this part.

(2) TIMING OF APPLICATION OF REDUCTIONS.—

(A) IN GENERAL.—Except as provided in subparagraph (B), if a reduction is made under paragraph (1) in payment amounts pursuant to a sequestration order, the reduction shall be applied to payment for services furnished during the effective period of the order. For purposes of the previous sentence, in the case of inpatient services furnished for an individual, the services shall be considered to be furnished on the date of the individual's discharge from the inpatient facility.

(B) PAYMENT ON THE BASIS OF COST REPORTING PERIODS.—In the case in which payment for services of a provider of services is made under title XVIII of the Social Security Act on a basis relating to the reasonable cost incurred for the services during a cost reporting period of the provid-

er, if a reduction is made under paragraph (1) in payment amounts pursuant to a sequestration order, the reduction shall be applied to payment for costs for such services incurred at any time during each cost reporting period of the provider any part of which occurs during the effective period of the order, but only (for each such cost reporting period) in the same proportion as the fraction of the cost reporting period that occurs during the effective period of the order.

(C) EFFECTIVE PERIOD OF ORDER FOR FISCAL YEAR 1986.—For purposes of this paragraph, the effective period of a sequestration order for fiscal year 1986 is the period beginning on March 1, 1986, and ending on September 30, 1986.

(3) NO INCREASE IN BENEFICIARY CHARGES IN ASSIGNMENT-RELATED CASES.—If a reduction in payment amounts is made under paragraph (1) for services for which payment under part B of title XVIII of the Social Security Act is made on the basis of an assignment described in section 1842(b)(3)(B)(ii), in accordance with section 1842(b)(6)(B), or under the procedure described in section 1870(f)(1), of such Act, the person furnishing the services shall be considered to have accepted payment of the reasonable charge for the services, less any reduction in payment amount made pursuant to a sequestration order, as payment in full.

(4) NO EFFECT ON COMPUTATION OF AAPCC.—In computing the adjusted average per capita cost for purposes of section 1876(a)(4) of the Social Security Act, the Secretary of Health and Human Services shall not take into account any reductions in payment amounts which have been or may be effected under this part.

(e) TREATMENT OF CHILD SUPPORT ENFORCEMENT PROGRAM.—Any order issued by the President under section 252 shall accomplish the full amount of any required re-

duction in expenditures under sections 455 and 458 of the Social Security Act by reducing the Federal matching rate for State administrative costs under such program, as specified (for the fiscal year involved) in section 455(a) of such Act, to the extent necessary to reduce such expenditures by that amount.

(f) TREATMENT OF FOSTER CARE AND ADOPTION ASSISTANCE PROGRAMS.—Any order issued by the President under section 252 shall make the reduction which is otherwise required under the foster care and adoption assistance programs (established by part E of title IV of the Social Security Act) only with respect to payments and expenditures made by States in which increases in foster care maintenance payment rates or adoption assistance payment rates (or both) are to take effect during the fiscal year involved, and only to the extent that the required reduction can be accomplished by applying a uniform percentage reduction to the Federal matching payments that each such State would otherwise receive under section 474 of that Act (for such fiscal year) for that portion of the State's payments which is attributable to the increases taking effect during that year. No State may, after the date of the enactment of this joint resolution, make any change in the timetable for making payments under a State plan approved under part E of title IV of the Social Security Act which has the effect of changing the fiscal year in which expenditures under such part are made.

(g) FEDERAL PAY.—

(1) IN GENERAL.—For purposes of any order issued under section 252—

(A) Federal pay under a statutory pay system, and

(B) elements of military pay,

shall be subject to reduction under an order in the same manner as other administrative expense components of the Federal budget; except that no such order may reduce or have the effect of reducing the

rate of pay to which any individual is entitled under any such statutory pay system or the rate of any element of military pay to which any individual is entitled under title 37, United States Code, or any increase in rates of pay which is scheduled to take effect under section 5305 of title 5, United States Code, section 1009 of title 37, United States Code, or any other provision of law.

(2) DEFINITIONS.—For purposes of this subsection:

(A) The term "statutory pay system" shall have the meaning given that term in section 5301(c) of title 5, United States Code.

(B) The term "elements of military pay" means—

(i) the elements of compensation of members of the uniformed services specified in section 1009 of title 37, United States Code,

(ii) allowances provided members of the uniformed services under sections 403a and 405 of such title, and

(iii) cadet pay and midshipman pay under section 203(c) of such title.

(C) The term "uniformed services" shall have the meaning given that term in section 101(3) of title 37, United States Code.

(h) TREATMENT OF PAYMENTS AND ADVANCES MADE WITH RESPECT TO UNEMPLOYMENT COMPENSATION PROGRAMS.—(1) For purposes of section 252—

(A) any amount paid as regular unemployment compensation by a State from its account in the Unemployment Trust Fund (established by section 904(a) of the Social Security Act),

(B) any advance made to a State from the Federal unemployment account (established by section 904(g) of such Act) under title XII of such Act and any advance appropriated to the Federal unemployment account pursuant to section 1203 of such Act, and

(C) any payment made from the Federal Employees Compensation Account (as established under section 909 of such Act) for the purpose of carrying out chapter 85 of title 5, United States Code, and funds appropriated or transferred to or otherwise deposited in such Account,

shall not be subject to reduction.

(2)(A) A State may reduce each weekly benefit payment made under the Federal-State Extended Unemployment Compensation Act of 1970 for any week of unemployment occurring during any period with respect to which payments are reduced under an order issued under section 252 by a pecentage not to exceed the percentage by which the Federal payment to the State under section 204 of such Act is to be reduced for such week as a result of such order.

(B) A reduction by a State in accordance with subparagraph (A) shall not be considered as a failure to fulfill the requirements of section 3304(a)(11) of the Internal Reveue Code of 1954.

(i) TREATMENT OF MINE WORKER DISABILITY COMPENSATION INCREASES AS AUTOMATIC SPENDING INCREASES.—An order issued by the President under section 252 may not result in eliminating or reducing an increase in disability benefits under the Federal Mine Safety and Health Act except in the manner provided for automatic spending increases under section 252(a)(1)(A), and no such increase may, pursuant to such section, be reduced below zero.

(j) COMMODITY CREDIT CORPORATION.—

(1) POWERS AND AUTHORITIES OF THE COMMODITY CREDIT CORPORATION.—This title shall not restrict the Commodity Credit Corporation in the discharge of its authority and responsibility as a corporation to buy and sell commodities in world trade, to use the proceeds as a revolving fund to meet other obligations and otherwise operate as a corporation, the purpose for which it was created.

(2) REDUCTION IN PAYMENTS MADE UNDER CONTRACTS.—(A) Payments and loan eligibility under any contract entered into with a person by the Commodity Credit Corporation prior to the time an order has been issued under section 252 shall not be reduced by an order subsequently issued. Subject to subparagraph (B), after an order is issued under such section for a fiscal year, any cash payments made by the Commodity Credit Corporation—

(i) under the terms of any one-year contract entered into in such fiscal year and after the issuance of the order; and

(ii) out of an entitlement account,

to any person (including any producer, lender, or guarantee entity) shall be subject to reduction under the order.

(B) Each contract entered into with producers or producer cooperatives with respect to a particular crop of a commodity and subject to reduction under subparagraph (A) shall be reduced in accordance with the same terms and conditions. If some, but not all, contracts applicable to a crop of a commodity have been entered into prior to the issuance of an order under section 252, the order shall provide that the necessary reduction in payments under contracts applicable to the commodity be uniformly applied to all contracts for the next succeeding crop of the commodity, under the authority provided in paragraph (3).

(3) DELAYED REDUCTION IN OUTLAYS PERMISSIBLE.—Notwithstanding any other provision of this joint resolution, if an order under section 252 is issued with respect to a fiscal year, any reduction under the order applicable to contracts described in paragraph (1) may provide for reductions in outlays for the account involved to occur in the fiscal year following the fiscal year to which the order applies. No other account, or other program, project, or activity, shall

bear an increased reduction for the fiscal year to which the order applies as a result of the operation of the preceding sentence.

(4) UNIFORM PERCENTAGE RATE OF REDUCTION AND OTHER LIMITATIONS.—All reductions described in paragraph (2) which are required to be made in connection with an order issued under section 252 with respect to a fiscal year—

(A) shall be made so as to ensure that outlays for each program, project, activity, or account involved are reduced by a percentage rate that is uniform for all such programs, projects, activities, and accounts, and may not be made so as to achieve a percentage rate of reduction in any such item exceeding the rate specified in the order; and

(B) with respect to commodity price support and income protection programs, shall be made in such manner and under such procedures as will attempt to ensure that—

(i) uncertainty as to the scope of benefits under any such program is minimized;

(ii) any instability in market prices for agricultural commodities resulting from the reduction is minimized; and

(iii) normal production and marketing relationships among agricultural commodities (including both contract and non-contract commodities) are not distorted.

In meeting the criterion set out in clause (iii) of subparagraph (B) of the preceding sentence, the President shall take into consideration that reductions under an order may apply to programs for two or more agricultural commodities that use the same type of production or marketing resources or that are alternative commodities among which a producer could choose in making annual production decisions.

(5) NO DOUBLE REDUCTION.—No agricultural price support or income protection program that is subject to reduction under an order issued under section 252 for a fiscal year may be subject, as well, to modification or suspension under such order as an automatic spending increase.

(6) CERTAIN AUTHORITY NOT TO BE LIMITED.—Nothing in this joint resolution shall limit or reduce, in any way, any appropriation that provides the Commodity Credit Corporation with budget authority to cover the Corporation's net realized losses.

(k) COMMUNITY AND MIGRANT HEALTH CENTERS, INDIAN HEALTH SERVICES AND FACILITIES, AND VETERANS' MEDICAL CARE.—

(1) The maximum permissible reduction in budget authority for any account listed in paragraph (2) for any fiscal year, pursuant to an order issued under section 252, shall be—

(A) 1 percent in the case of the fiscal year 1986, and

(B) 2 percent in the case of any subsequent fiscal year.

(2) The accounts referred to in paragraph (1) are as follows:

(A) Community health centers (75-0350-0-1-550).

(B) Migrant health centers (75-0350-0-1-550).

(C) Indian health facilities (75-0391-0-1-551).

(D) Indian health services (75-0390-0-1-551).

(E) Veterans' medical care (36-0160-0-1-703).

For purposes of the preceding provisions of this paragraph, programs are identified by the designated budget account identification code numbers set forth in the Budget of the United States Government—Appendix.

(l) TREATMENT OF OBLIGATED BALANCES.—

(1) In general.—Except as provided in paragraph (2), obligated balances shall not be subject to reduction under an order issued under section 252.

(2) Exception.—Existing contracts in major functional category 050 (other than (A) those contracts which include a specified penalty for cancellation or modification by the Government and which if so cancelled or modified would result (due to such penalty) in a net loss to the Government for the fiscal year, and (B) those contracts the reduction of which would violate the legal obligations of the Government) shall be subject to reduction, in accordance with section 251(d)(3), under an order issued under section 252.

(3) Definition.—For purposes of this subsection, the term "existing contracts" shall include all military and civilian contracts in major functional category 050 which exist at the time the order involved is issued under section 252.

SEC. 257. DEFINITIONS.

For purposes of this title:

(1) The term "automatic spending increase" (except as otherwise provided in sections 255 and 256) means—

(A) increases in budget outlays due to changes in indexes in the following Federal programs:

Black lung benefits (20-8144-0-7-601);

Central Intelligence Agency retirement and disability system fund (56-3400-0-1-054);

Civil service retirement and disability fund (24-8135-0-7-602);

Comptrollers general retirement system (05-0107-0-1-801);

Foreign service retirement and disability fund (19-8186-0-7-602);

Judicial survivors' annuities fund (10-8110-0-7-602);

Longshoremen's and harborworkers' compensation benefits (16-9971-0-7-601);

Military retirement fund (97-8097-0-7-602);

National Oceanic and Atmospheric Administration retirement (13-1450-0-1-306);

Pensions for former Presidents (47-0105-0-1-802);

Railroad retirement tier II (60-3011-0-7-601);

Retired pay, Coast Guard (69-0241-0-1-403);

Retirement pay and medical benefits for commissioned officers, Public Health Service (75-0379-0-1-551);

Special benefits, Federal Employees' Compensation Act (16-1521-0-1-600);

Special benefits for disabled coal miners (75-0409-0-1-601); and

Tax Court judges survivors annuity fund (23-8115-0-7-602); and

(B) increases in budget outlays due to changes in indexes in the following Federal programs;

National Wool Act (12-4336-0-3-351):

Special milk program (12-3502-0-1-605); and

Vocational rehabilitation (91-0301-0-1-506).

For purposes of the preceding provisions of this paragraph, programs are identified by the designated budget account identification code numbers set forth in the Budget of the United States Government, 1986—Appendix.

(2) The terms "budget outlays" and "budget authority" have the meaning given to such terms in sections 3(1) and 3(2), respectively, of the Congressional Budget and Impoundment Control Act of 1974.

(3) The term "concurrent resolution on the budget" has the meaning given to such term in section 3(4) of

the Congressional Budget and Impoundment Control Act of 1974.

(4) The term "deficit" has the meaning given to such term in section 3(6) of the Congressional Budget and Impoundment Control Act of 1974.

(5) The term "maximum deficit amount", with respect to any fiscal year, means the maximum deficit amount for such fiscal year determined under section 3(7) of the Congressional Budget and Impoundment Control Act of 1974.

(6) The term "real economic growth", with respect to any fiscal year, means the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions.

(7) The terms "sequester" and "sequestration" (subject to section 252(a)(4)) refer to or mean the cancellation of new budget authority, unobligated balances, obligated balances, new loan guarantee commitments, new direct loan obligations, and spending authority as defined in section 401(c)(2) of the Congressional Budget Act of 1974, and the reduction of obligation limitations.

(8) The term "account" means an item for which appropriations are made in any appropriation Act used to determine the budget base, and, for items not provided for in appropriation Acts, such term means an item for which there is a designated budget account identification code number in the Appendix to the President's budget.

* * *

PART E—MISCELLANEOUS AND RELATED PROVISIONS

SEC. 271. WAIVERS AND SUSPENSIONS: RULEMAKING POWERS.

(a) BUDGET ACT WAIVERS IN THE SENATE.—Section 904 of the Congressional Budget Act of 1974 is amended by

redesignating subsection (c) as subsection (d), and by inserting after subsection (b) the following new subsection:

"(c) Sections 305(b)(2) and 306 of this Act may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn.".

(b) OTHER WAIVERS AND SUSPENSIONS IN THE SENATE.—Sections 301(i), 302(f), 304(b), 310(d), 310(g), and 311(a) of the Congressional Budget Act of 1974 may be waived or suspended in the Senate only by the affirmative vote of three-fifths of the Members, duly chosen and sworn. This subsection shall not apply to any joint resolution reported or discharged pursuant to section 254(a) of this joint resolution.

(c) RULEMAKING POWERS.—The provisions of this title, other than those relating to the activities of the executive and judicial branches of the Government, are enacted by the Congress—

(1) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such they shall be considered as part of the rules of each House, respectively, or of that House to which they specifically apply, and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(2) with full recognition of the constitutional right of either House to change such rules (so far as relating to such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

* * *

SEC. 274. JUDICIAL REVIEW.

(a) EXPEDITED REVIEW.—

(1) Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief on the ground that any order that might be

issued pursuant to section 252 violates the Constitution.

(2) Any Member of Congress, or any other person adversely affected by any action taken under this title, may bring an action, in the United States District Court for the District of Columbia, for declaratory judgment and injunctive relief concerning the constitutionality of this title.

(3) Any Member of Congress may bring an action, in the United States District Court for the District of Columbia, for declaratory and injunctive relief on the ground that the terms of an order issued under section 252 do not comply with the requirements of this title.

(4) A copy of any complaint in an action brought under paragraph (1), (2), or (3) shall be promptly delivered to the Secretary of the Senate and the Clerk of the House of Representatives, and each House of Congress shall have the right to intervene in such action.

(5) Any action brought under paragraph (1), (2), or (3) shall be heard and determined by a three-judge court in accordance with section 2284 of title 28, United States Code.

Nothing in this section or in any other law shall infringe upon the right of the House of Representatives to intervene in an action brought under paragraph (1), (2), or (3) without the necessity of adopting a resolution to authorize such intervention.

(b) APPEAL TO SUPREME COURT.—Notwithstanding any other provision of law, any order of the United States District Court for the District of Columbia which is issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States. Any such appeal shall be taken by a notice of appeal filed within 10 days after such order is entered; and the jurisdictional statement shall be filed within 30 days after such order is

entered. No stay of an order issued pursuant to an action brought under paragraph (1), (2), or (3) of subsection (a) shall be issued by a single Justice of the Supreme Court.

(c) EXPEDITED CONSIDERATION.—It shall be the duty of the District Court for the District of Columbia and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter brought under subsection (a).

(d) NONCOMPLIANCE WITH SEQUESTRATION PROCEDURES.—

(1) If it is finally determined by a court of competent jurisdiction that an order issued by the President under section 252(b) for any fiscal year—

(A) does not reduce automatic spending increases under any program specified in section 257(1) to the extent that such increases are required to be reduced by part C of this title (or reduces such increases by a greater extent than is so required),

(B) does not sequester the amount of new budget authority, new loan guarantee commitments, new direct loan obligations, or spending authority which is required to be sequestered by such part (or sequesters more than that amount) with respect to any program, project, activity, or account, or

(C) does not reduce obligation limitations by the amount by which such limitations are required to be reduced under such part (or reduces such limitations by more than that amount) with respect to any program, project, activity, or account,

the President shall, within 20 days after such determination is made, revise the order in accordance with such determination.

(2) If the order issued by the President under section 252(b) for any fiscal year—

(A) does not reduce any automatic spending increase to the extent that such increase is required to be reduced by part C of this title,

(B) does not sequester any amount of new budget authority, new loan guarantee commitments, new direct loan obligations, or spending authority which is required to be sequestered by such part, or

(C) does not reduce any obligation limitation by the amount by which such limitation is required to be reduced under such part,

on the claim or defense that the constitutional powers of the President prevent such sequestration or reduction or permit the avoidance of such sequestration or reduction, and such claim or defense is finally determined by the Supreme Court of the United States to be valid, then the entire order issued pursuant to section 252(b) for such fiscal year shall be null and void.

(e) TIMING OF RELIEF.—No order of any court granting declaratory or injunctive relief from the order of the President issued under section 252, including but not limited to relief permitting or requiring the expenditure of funds sequestered by such order, shall take effect during the pendency of the action before such court, during the time appeal may be taken, or, if appeal is taken, during the period before the court to which such appeal is taken has entered its final order disposing of such action.

(f) ALTERNATIVE PROCEDURES FOR THE JOINT REPORTS OF THE DIRECTORS.—

(1) In the event that any of the reporting procedures described in section 251 are invalidated, then any report of the Directors referred to in section 251(a) or (c)(1) shall be transmitted to the joint committee established under this subsection.

(2) Upon the invalidation of any such procedure there is established a Temporary Joint Committee on Deficit Reduction, composed of the entire member-

ship of the Budget Committees of the House of Representatives and the Senate. The Chairman of these two committees shall act as Co-Chairmen of the Joint Committee. Actions taken by the Joint Committee shall be determined by the majority vote of the members representing each House. The purposes of the Joint Committee are to receive the reports of the Directors as described in paragraph (1), and to report (with respect to each such report of the Directors) a joint resolution as described in paragraph (3).

(3) No later than 5 days after the receipt of a report of the Directors in accordance with paragraph (1), the Joint Committee shall report to the House of Representatives and the Senate a joint resolution setting forth the contents of the report of the Directors.

(4) The provisions relating to the consideration of a joint resolution under section 254(a)(4) shall apply to the consideration of a joint-resolution reported pursuant to this subsection in the House of Representatives and the Senate, except that debate in each House shall be limited to two hours.

(5) Upon its enactment, the joint resolution shall be deemed to be the report received by the President under section 251(b) or (c)(2) (whichever is applicable).

(g) Preservation of Other Rights.—The rights created by this section are in addition to the rights of any person under law, subject to subsection (e).

(h) Economic Data, Assumptions, and Methodologies.—The economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays, as specified in any report issued by the Comptroller General under section 251(b) or (c)(2), shall not be subject to review in any judicial or administrative proceeding.

SEC. 275. EFFECTIVE DATES.

(a) In General.—

(1) Except as provided in paragraph (2) and in subsections (b) and (c), this title and the amendments made by this title shall become effective on the date of the enactment of this title and shall apply with respect to fiscal years beginning after September 30, 1985.

(2)(A) The amendment made by section 201(a)(2), and the amendment made by section 201(b) insofar as it relates to subsections (c), (f), and (g) of section 302 of the Congressional Budget Act of 1974 and to subsections (c), (d), and (g) of section 310 of that Act), shall become effective April 15, 1986.

(B) The amendment made by section 212 shall become effective February 1, 1986.

(b) EXPIRATION.—

(1) Part C of this title, and the other provisions contained in or added by this title which are listed in paragraph (2), shall expire September 30, 1991.

(2) The other provisions referred to in paragraph (1) are as follows:

(A) section 3(7) of the Congressional Budget and Impoundment Control Act of 1974 and the second sentence of section 3(6) of such Act (as added by section 201(a)(1) of this joint resolution);

(B) sections 301(i) and 304(b) of the Congressional Budget Act of 1974 and the portion of section 311(a) of such Act which begins with "or, in the Senate" and ends with "paragraph (2) of such subsection)" (as added by section 201(b) of this joint resolution);

(C) sections 1105(f) and 1106(c) of title 31, United States Code (as added by sections 241(b) and 242(b) of this joint resolution); and

(D) section 271(b) of this joint resolution.

(c) OASDI TRUST FUNDS.—The amendments made by part D shall apply as provided in such part.

Approved December 12, 1985.

(12) (11) (12)

Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP

STEVEN R. ROSS (Counsel of Record),
General Counsel to the Clerk.

CHARLES TIEFER,
Deputy General Counsel to the Clerk.

MICHAEL L. MURRAY,
JANINA JARUZELSKI,
Assistant Counsels to the Clerk.

H-105, The Capitol,
Washington, D.C. 20515.
(202) 225-9700

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QUESTION PRESENTED

The Balanced Budget and Emergency Deficit Control Act of 1985 requires the Comptroller General, an independent officer appointed by the President with the advice and consent of the Senate to a fixed term of office, to perform certain factfinding functions. Does the separation of powers doctrine require a declaration that the Act is unconstitutional in light of the fact that the 1921 statute creating the office of Comptroller General included language which would permit the removal of the Comptroller General by the adoption, through the regular and complete statutory enactment process, of a joint resolution?

PARTIES IN THE DISTRICT COURT

The plaintiffs in Civil Action No. 85-3945 were Mike Synar, Gary Ackerman, Albert Bustamante, Silvio Conte, Don Edwards, Vic Fazio, Robert Garcia, John LaFalce, Jim Moody, Claude Pepper, Robert Torricelli, and James Traficant, Jr., all members of the Ninety-Ninth Congress. The plaintiff in Civil Action No. 85-4106 was the National Treasury Employees Union.

The United States was named as the defendant. The Speaker of the United States House of Representatives, Thomas P. O'Neill, Jr., and the Bipartisan Leadership Group of the House of Representatives, Jim Wright, Majority Leader; Robert Michel, Republican Leader; Thomas Foley, Majority Whip; and Trent Lott, Republican Whip, intervened as defendants. The United States Senate and the Comptroller General also intervened as defendants.

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BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, INTERVENOR-APPELLANTS

OPINION BELOW

The opinion of the district court, Joint Appendix ("J.A.") 27, has not been reported.

JURISDICTION

The judgment of the district court was entered on February 7, 1986, J.A. 81. Probable jurisdiction was noted with regard to the jurisdictional statements of the Speaker and Bipartisan Leadership Group of the House of Representatives ("House parties"),[1] the Senate, and the

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[1] The House parties are the Honorable Thomas P. O'Neill, Jr., Speaker of the House of Representatives, and the Bipartisan Leadership Group of the House of Representatives—the Honorable Jim Wright, Majority Leader; the Honorable Robert H. Michel, Republican Leader; and the Honorable Thomas S. Foley, Majority Whip. The Honorable Trent Lott, Republican Whip, participated in the Group in the court below and in the jurisdictional statement, but does not join in this brief. The participation of the Speaker and Bipartisan Leadership Group has become the regular mechanism for the House of Representatives to present its institutional interest in litigation. As the conference report on the Act explains, section 274(a)(4), J.A. 163,

> also provides for intervention by the Senate and the House in such actions. It is intended that each body may employ what have developed to be the regular procedures to initiate participation in cases of institutional interest as they have in litigation concerning the 1984 Bankruptcy Act Amendments and the Competition in Contracting Act Amendments.

Increasing the Statutory Limit on the Public Debt, H.R. Rep. No. 433, 99th Cong., 1st Sess. 100 (1985) ("Conference Report"). *See, e.g., In re Benny,* 44 Bankr. 581 (N.D. Cal. 1984) (upholding 1984 Bankruptcy Act Amendments defended by Speaker and Bipartisan Leadership Group), *appeal argued,* Nos. 84-2805, *etc.* (9th Cir. July 10, 1985); *Ameron, Inc. v. U.S. Army Corps of Engineers,* 607 F. Supp. 962 and 610 F. Supp. 750 (D.N.J. 1985) (upholding Competition in Contracting Act defended by Speaker and Bipartisan Leadership Group), *appeals argued,* Nos. 85-5226, 85-5377 (3d Cir. Oct. 29, 1985).

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Comptroller General on February 24, 1986. This Court has jurisdiction pursuant to section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985 ("Deficit Control Act" or "Act"), Pub. L. No. 99-177, 99 Stat. 1037, 1098-99, J.A. 163, and to 28 U.S.C. § 1252 (1982).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent constitutional and statutory provisions are set forth at J.A. 103 (the Act), J.A. 93 (Budget and Accounting Act of 1921, 42 Stat. 20), J.A. 101 (31 U.S.C. § 703 (1982)), and J.A. 91 (U.S. Const., art. I and II).

STATEMENT OF THE CASE

A. ENACTMENT OF THE DEFICIT CONTROL ACT

The plaintiffs and the defendant United States ("Executive Branch") challenged the Act on its face immediately upon enactment, so the key facts consist of the proceedings and the reasons leading to enactment. These show why Congress, with the President's strong support, enacted the Deficit Control Act, and why the Act conferred a role upon the Comptroller General (also referred to herein as "Comptroller," "General Accounting Office", and "GAO").

In recent years, the President and Congress have faced a deficit problem of unprecedented proportions. The severity of the problem can be summed up in three analyses. David Stockman, Director of the Office of Management and Budget ("OMB") testified in 1984 as follows regarding the increasing interest on the national debt:

> On a current services basis, net interest could easily hit $160 to $180 billion in the late 1980's and I do not think there is anybody on this Committee who could think of enough taxes to raise or enough spending to cut to even offset that explosion of debt service cost. We are in the same position that

> many companies are in when they are on the eve of chapter 11.[2]

The Congressional Budget Office's ("CBO") annual budget outlook for 1985 stated that "federal debt held by the public is projected to grow from $1.3 trillion at the end of fiscal year 1985 to $2.8 trillion by the end of 1990." [3] Finally, summarizing the sense of Members of both parties and both Houses, Representative Andrews addressed both the size of the debt and its impact:

> In 4 years, the annual deficit has grown from $59 billion to $220 billion and we are faced with a national debt of over $2 trillion. This is a debt that has doubled in only four short years.
>
> These deficits . . . translate[ ] into Americans out of work and families short of the necessities of life. . . . These deficits raise our national debt which mortgages the future of our children and grandchildren.

131 Cong. Rec. H 9613 (daily ed. Nov. 1, 1985).

In the Deficit Control Act, Congress finally chose, with the President's strong support, a draconian experiment to force the problem toward solution. On September 25, 1985, various Senators introduced a bill to establish an automatic budget cut process, which required either across-the-board budget cuts, or the enactment of sufficient spending or revenue legislation to meet deficit reduction targets.[4]

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[2] I *First Concurrent Resolution on the Budget—Fiscal Year 1985: Hearings Before the Sen. Comm. on the Budget*, 98th Cong., 2d Sess. 69 (1984) (testimony of OMB Director Stockman).

[3] Congressional Budget Office, *The Economic and Budget Outlook: Fiscal Years 1986–1990: A Report to the Senate and House Committees on the Budget—Part I* xxiii (1985).

[4] The bill was S. 1702, 99th Cong., 1st Sess., 131 Cong. Rec. S 12082 (daily ed. Sept. 25, 1985). Hearings were held while the proposal was considered on the floor. *The Balanced Budget and Emergency Deficit Control Act of 1985: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. (Oct. 17, 1985) ("*Government Operations Hearings*"); *Working Toward a Balanced Budget:*

Continued

After lengthy initial floor consideration, on October 10 the Senate passed the bill, as amended, as part of a resolution raising the ceiling on the national debt to over two trillion dollars. 131 Cong. Rec. S 13114 (daily ed. Oct. 10, 1985). The Senate version required that OMB and CBO jointly issue an annual report projecting the deficit; if they determined that deficit reduction targets had not been met, the report would calculate the across-the-board budget cuts to be made by Presidential order. After a first conference,[5] which was unsuccessful, the bill shuttled back and forth between the Houses.

On November 1, the House passed its own version providing that CBO, which is nonpartisan, would make the determination, upon consultation with OMB. 131 Cong. Rec. H 9590, 9616 (daily ed. Nov. 1, 1985) (text and adoption of section 251(a), the CBO provision). The Senate responded with a second version, this time vesting the determination in GAO, 131 Cong. Rec. S 14924 (daily ed. Nov. 6, 1985). In the House, Representatives Mack and Cheney also proposed such a GAO role. The House declined, before conference, to accept their proposal, but indicated bipartisan support for the GAO role. Representatives Mack and Cheney were included as special members of the delegation to a second conference, and the House accepted their proposal for a GAO role after that second conference.[6]

Hearing Before the House Comm. on the Budget, 99th Cong., 1st Sess. (Oct. 9, 1985); *The Budget Outlook and its Economic Implications: Hearings Before the House Comm. on the Budget*, 99th Cong., 1st Sess. (Oct. 10, 1985) ("*Budget Committee Hearings*").

[5] The first conference committee ended in disagreement, simply reporting back the Senate-passed ("Gramm-Rudman-Hollings") version of the Deficit Control Act. 131 Cong. Rec. H 9577-82 (daily ed. Nov. 1, 1985) (Deficit Control Act). Section 3(d)(1)(A), *id.* H 9579, was the joint OMB-CBO report provision.

[6] 131 Cong. Rec. H 9838, 9864 (daily ed. Nov. 6, 1985) (text and vote on section 204(a)(1), the Mack-Cheney GAO provision); *id.* H 9864, 9868 (offer and acceptance of motion to request a further conference); pages 20-23 *infra* (details of legislative debate). The Senate agreed to a

Continued

The legislative history amply shows that Congress gave responsibility for the determination to an independent officer out of concern, as the district court said, about what "the House conceived to be the pro-executive bias of the OMB." J.A. 60. Chairman Rostenkowski of the House Ways and Means Committee, the floor manager and offeror of the House version, had emphasized, as did other committee chairmen,[7] the danger of vesting the determination in OMB rather than in a nonpartisan body. In response, Representative Mack offered the proposal assigning the determination to GAO, to "wall" off the determination from either the President or the Congress. Representative Gephardt signaled for the House Democrats why that proposal was ultimately going to be accepted:

> . . . A lot of our Members, both Republican and Democrat want a wall to be created that takes these decisions out of the hands of the President and the Congress, and I think a lot of Members on our side share the desire to have a wall.

131 Cong. Rec. H 9846 (daily ed. Nov. 6, 1985) (Rep. Gephardt).

As discussed in greater detail below, Representatives Mack and Cheney, the House proponents of a GAO role, relied particularly on recent court cases rejecting Department of Justice challenges to GAO's constitutionality. In those cases, contemporaneous with the legislative consideration of the Deficit Control Act, the courts had uniformly confirmed GAO's independence, rejected the

second conference. *Id.* S 15043 (daily ed. Nov. 7, 1985); Conference Report, *supra* note 1, at 123 (conference delegation).

[7] Chairman Rostenkowski commented succinctly in support of his own amendment (which the House adopted as its version), that "[u]nder Gramm-Rudman [i.e., the first Senate version], the President could orchestrate the cuts through OMB." 131 Cong. Rec. H 9597 (daily ed. Nov. 1, 1985) (Rep. Rostenkowski); 131 Cong. Rec. H 9598 (daily ed. Nov. 1, 1985) (Chairman Brooks); *Budget Committee Hearings, supra* note 4, at 39 (Chairman Gray); *Government Operations Hearings, supra* note 4, at 82-84 (exchanges between Chairman Brooks and OMB Director Miller).

charge of Congressional control or influence, and sustained the GAO as constitutional. *Ameron, supra* note 1; *Lear Siegler, Inc., et al. v. John Lehman, et al.,* No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985) (similarly upholding that GAO role).

As ultimately adopted, the Act responds to the deficit problem with an annual deficit reduction process. Each year, pursuant to schedule, GAO reports to the President regarding whether the deficit projected under current law is above the level that would trigger the cuts, and if it is, applies the statutory formula to that deficit. Section 251(b)(1) of the Act, J.A. 116. The Directors of OMB and CBO furnish GAO with an advisory report about the deficit projection and formula-based cuts. GAO is to "review and consider" this report and to give it "due regard," but is not bound by it. Section 251(b)(1), J.A. 116.[8]

If the deficit is projected above the accepted level, the President issues a sequestration order making the cuts. Section 252(a)(1), J.A. 124. That procedure has already been followed for the current fiscal year on an expedited schedule set forth in the Act, as discussed in the Senate's brief.

B. THE DISTRICT COURT DECISION

Immediately after the President signed the Act into law, Representative Mike Synar and the other plaintiffs invoked the Act's judicial review provision and filed suit to challenge the Act on its face, primarily on delegation grounds. The Department of Justice appeared in the name of the United States, representing the interests of the Executive Branch. The Executive devoted most of its effort to repeating the challenges to the GAO it had previously presented unsuccessfully in *Ameron* and *Lear*

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[8] The legislative history reinforces that the ultimate report rests on independent GAO determinations, rather than on the advice of the Congressional or Presidential budget offices. *See* Conference Report, *supra* note 1, at 84 (Comptroller General expected to perform "independent analysis" and to "monitor all relevant data on an on-going basis").

Siegler. However, the Executive did defend the Act against plaintiffs' delegation challenge.

The Senate and House parties intervened to defend the Act against the Executive's challenge, a procedure approved by this Court, *Immigration & Naturalization Service v. Chadha,* 462 U.S. 919, 940 (1983), and the Comptroller General also intervened to defend. The House parties have addressed only the challenge to the GAO and have taken no position on the delegation issue. A three-judge district court heard argument on dispositive cross-motions.

After passing upon threshold objections and upholding the Act against the delegation challenge, the court struck down the Act because of the GAO's role.[9] First, the district court analyzed the GAO's function of projecting the deficit, applying the statutory formula to that deficit, and issuing its determination thereupon. The court concluded that this was not a function within the rule of *Humphrey's Executor v. United States,* 295 U.S. 602 (1935), authorizing performance of quasi-legislative, quasi-judicial, and incidental functions by independent agencies. Its opinion fairly characterized GAO's function as "the interpretation of the law," and "the exercise of substantial judgment concerning present and future facts that affect the application of the law," J.A. 72. Although independent agencies have always performed those functions, the district court deemed such functions to be "normally . . . executive" and "executive functions." J.A. 72, 75.

The Executive Branch's main thrust was a sweeping assault on the GAO's independent performance of its traditional functions and on the viability of *Humphrey's Executor*. Only three years ago, this Court described GAO as

[9] Plaintiffs argued that GAO's role would not be what the Act prescribed—that GAO would just " 'rubber-stamp' " a decision by others instead of making its own independent decision; after receiving extensive treatments of the legislative history and an uncontested affidavit by the Comptroller General showing the contrary, the district court rejected that argument out of hand as "unconvincing." J.A. 55 n.18

an "independent agency," *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983), and as noted above, two courts have recently applied the *Humphrey's Executor* rule to sustain the GAO. The district court did not deem *Bowsher* or these two rulings worthy of discussion. Instead, the court brushed these key precedents off in a footnote with "*see, e.g.*" and "*but cf.*" citations. J.A. 72 n.9. The court then claimed that it was "difficult to reconcile *Humphrey's Executor's* 'headless fourth branch' with a constitutional text and tradition establishing three branches of government," J.A. 69, and characterized that decision of this Court as "stamped with some of the political science preconceptions characteristic of its era and not of the present day," J.A. 68. It entered an order striking down this Act because of the GAO role, and appellants sought review by this Court.

SUMMARY OF ARGUMENT

The political Branches, after extensive debate, devised this Act as an experimental response to a major national problem. In addressing the facial challenge to this Act, the Court should adhere to its consistent approach in separation of powers cases: avoiding the "archaic" view of a rigid framework, particularly where, as here, the challenged Act does not run afoul of any specific constitutional prohibitions.

In this Act, the GAO's pertinent functions are clear: projecting the deficit and applying the statutory formula to that deficit, thereby calculating the cuts to be made. The district court fairly characterized the functions as "interpretation of the law" and "application of the law" to the facts. J.A. 72. Established constitutional law leaves no doubt that, assuming a proper delegation, the President and Congress may decide to "wall" off such calculations from politics by assigning them to an independent agency. *Humphrey's Executor v. United States,* 295 U.S. 602 (1935); *Buckley v. Valeo,* 424 U.S. 1, 141 (1976). The history of the independent Federal Reserve Board amply supports such a role for an independent agency.

The Executive Branch's main separation of powers challenge is not about whether these functions could be vested in an independent agency; rather, the Executive directs its assault to *Humphrey's Executor* and the performance of traditional functions by an independent Comptroller. Article I, sec. 9, cl. 7, J.A. 91, providing that "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," incorporates into the Constitution the historic power of the purse, with its necessity for an independent comptroller as a check on the Executive. British, state, and federal history contemporaneous with the Constitutional Convention show that the Framers deeply understood that necessity. As the Court observed in *Humphrey's Executor,* 295 U.S. at 631, during the First Congress when the "Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, a different rule in respect of executive removal might well apply." *See Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 162, 167 (1803) (officers with fixed terms performing quasi-judicial functions not removable).

The 1921 budget statute reacted against the President's use of removal threats to obtain the Comptroller's subservience. That law allowed the President to appoint the Comptroller, subject to Senate confirmation, to a fifteen-year term, but included a number of measures to secure the Comptroller's independence, including freedom from Presidential removal at will. While *Myers v. United States,* 272 U.S. 52, 135 (1926), suggested that quasi-judicial and quasi-legislative officers, such as the Comptroller, were removable at will, *Humphrey's Executor* overruled it on that specific point, 295 U.S. at 629. Much as this Court recently recognized with perfectly consistency that "[t]he GAO is an independent agency within the legislative branch," *Bowsher v. Merck & Co.,* 460 U.S. at 844, so the *Humphrey's Executor* Court recognized that the

FTC performs its functions independently as an "agency of the legislative . . . department [ ] of government." 295 U.S. at 628. *Buckley v. Valeo,* and fifty years of legislative consideration, have confirmed the soundness of the rule of *Humphrey's Executor.*

The contention common to the Executive Branch's challenges to the GAO in *Lear Siegler, Ameron,* and this case, is that the GAO cannot be an "independent agency" because the Houses of Congress allegedly control it. In each instance, the Executive relies heavily on the provision for removal of the Comptroller General by public law. The Executive challenge is without merit. The President appoints the Comptroller General, as President Reagan appointed the current Comptroller, Charles A. Bowsher. Repeatedly, the courts have found that the GAO functions freely and independently without Congressional control or influence.

The sixty-five-year-old removability provision soundly and constitutionally requires, in order to remove the Comptroller General before the end of his fifteen-year term, the full application of the legal power of the President and the Congress through enactment of a public law. As such, it is not inconsistent with any provision of the Constitution. The Comptroller General, in law and in practice, serves the nation as an independent officer, subservient to neither the Congress nor the Executive. Thus, the determination by the political branches to utilize his unique independence as an important element in this historic effort to address a national problem of considerable scope should not be disturbed by this Court.

ARGUMENT

I.

THE FUNCTIONS ASSIGNED BY THE DEFICIT CONTROL ACT ARE SUITABLE FOR AN INDEPENDENT OFFICER

This Act makes the challenged functions assigned to the GAO quite clear. In the district court's words:

> Under subsection 251(b)(1), the Comptroller General must specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and he must specify which particular budget items are required to be reduced . . . and in what particular amounts.

J.A. 72. There is little dispute over the calculations to be performed by GAO: projecting the deficit, and applying the statutory formula to that deficit, thereby calculating the cuts.

Nevertheless, the challengers of the Act made strained arguments about the functions, which the district court accepted:

> The first of these specifications require the exercise of substantial judgment concerning present and future facts, that affect the *application of the law*—the sort of power normally conferred upon the executive officer charged with implementing a statute. The second specification requires an *interpretation of the law* enacted by Congress, similarly a power normally committed initially to the Executive . . . . In our view, these cannot be regarded as anything but executive powers in the constitutional sense.

Id. 72–73 (emphasis supplied). Based on this analysis, the district court apparently concluded that the functions could not be performed by an independent agency.[10]

In light of this Court's repeated pronouncements, from 1935 to 1976, confirming that independent agencies can

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[10] The district court is somewhat vague on this point, but it cited two descriptions in *Humphrey's Executor* of the functions that can be performed by independent agencies, J.A. 71 (citing *Humphrey's Executor,* 295 U.S. at 628), and concluded that "[t]he Comptroller General's powers under the automatic deficit reduction process, however, do not come within that category," *id. Compare* J.A. 80 ("our holding today reaffirms [Congress] must [leave such decisions] to an officer within the control of the executive branch") *with* J.A. 60 (contending that whether "validation of [the Comptroller General's] functions under this legislation might constitutionally require" that he be "removable . . . at the discretion of the President, like the Director of the OMB himself" is "a point we do not reach").

perform their traditional functions. the challengers' claim that no independent agency could perform "interpretation of the law" and "application of the law" is transparently incorrect. For example, in *Buckley v. Valeo*, this Court applied a functional analysis that permitted independent agencies to perform their traditional functions:

> All aspects of the Act are brought within the Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibiity for funds and even for federal elective office itself. These functions . . . are of kinds usually performed by independent regulatory agencies or by some department. . . . [E]ach of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. . . . [T]he president may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). . . .

Id. at 140–141 (footnote omitted); *accord, Wiener v. United States*, 357 U.S. 349 (1958).

Patently, "interpretation of the law" and "application of the law" to facts, GAO's functions in this Act, are the heart of the functions performed every day for the past century and longer by independent regulatory commissions and their precursors. Such functions are precisely what the FTC did in *Humphrey's Executor*, the War Claims Commission did in *Wiener*, and the Federal Election Commission (upon cure of the appointments problem) did in *Buckley*. By contrast, they do not constitute the purely executive functions discussed in *Myers* which do not require independence.

If, for example, Congress directed an independent board with jurisdiction over natural gas rates or federal pensions to apply statutory formulae to projections about next year's rates or pension costs, and to direct adjustments in those rates or pensions, it is difficult to imagine that this would be deemed a violation of the separation of powers because the board was independent. Yet that is

apparently how the challengers would rewrite the Constitution.

In fact, Circuit Judge Scalia, at argument, put the matter best when he analogized the functions in the current Act to a host of traditional independent agency functions:

> What about rate regulation, Mr. Morrison? . . . . If you take all of the federal rate-making agencies that make judgments as to what prices power companies can charge next year, what transportation companies can charge next year and so forth, large segments of the economy, they make all of those judgments on the basis of precisely the kind of predictions you are talking about here, what will the inflation rate be, how will the economy be, how much electricity will be used.

Transcript of *Synar* v. *United States*, Jan. 10, 1986, at 15–16.[11]

In its opinion, the district court concluded that

> [i]f the facts and predictions here are difficult to ascertain, they are no more so than many others committed to the charge of administrative officials, such as the complex economic calculations required of the agencies that determine the discount rate. . . . The Comptroller General is not made responsible for a single *policy* judgment. . . .

J.A. 51. The "discount rate" referred to is also set by an independent agency, the Federal Reserve Board.

In short, assuming the validity of the delegation, there can be no dispute that assignment of traditional functions to an independent agency is proper. Of course, there was a major debatable question—for the political Branches—as to the soundness of assigning the calculations on the scale of this Act to an independent agency. Still, such an assignment was not unprecedented; the Federal Reserve

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[11] The activities referred to are activities of independent agencies, such as the Federal Energy Regulatory Commission (ratemaking for power companies), the Interstate Commerce Commission and the Federal Maritime Commission (transportation rates).

Board, the nation's central bank, has been an independent agency with a scale of responsibility far beyond this Act, considering that the Board, independent since 1935, does not merely apply statutory formulae to projections, but makes national monetary *policy, see, e.g.*, T. Phalle, *The Federal Reserve: An Intentional Mystery* xxiii (1985). The challengers have never offered an iota of persuasive argument for why the Judiciary should constitutionalize the question of such assignments, particularly where, as the district court found, the task involves no policy judgments. J.A. 51. The rule of *Humphrey's Executor* allowed the political Branches to decide, for the sound reasons discussed in the legislative history above, to "wall" off these calculations from political control.

II.

THIS COURT HAS REJECTED THE "ARCHAIC" VIEW OF SEPARATION OF POWERS

In addressing the Executive's challenge to the GAO's performance of independent agency functions, the Court should adhere to its consistent approach to separation of powers cases. The Court has rejected the "archaic" view of a rigidly divided framework, particularly where, as here, the challenged Act does not run afoul of any specific constitutional prohibition. The separation of powers challenge to the constitutionality of the GAO's performing the calculations is a highly technical attack on one very limited, but vital, aspect of the Act. Moreover, that challenged aspect was, in many respects, the least controversial aspect of the Act during its legislative consideration from either a policy or constitutional standpoint.

The Deficit Control Act constitutes a bold experiment in fiscal control. It responds to one of the most intractable and drastic problems facing the nation today: a spiraling deficit feeding itself through interest on its own accumulation. Dealing with such problems is the peculiar responsibility of the political Branches in the enactment of statutes and the development of the budget, rather than

of the life-tenured Branch. At least since Justice Brandeis' eloquent plea that legislatures be allowed to engage in "experimentation," [12] the Court has recognized the latitude it should allow to necessary legislative innovation in matters of political responsibility—particularly where, as here, no civil liberties or individual rights are impaired by basically economic legislation.

When this Court set forth its fullest treatment of the standard for separation of powers, in *Nixon v. Administrator of General Services*, 433 U.S. 425 (1977), it rejected the "'archaic view of the separation of powers as requiring three airtight departments of government.'" *Id.* at 443. In determining whether a statute disrupts the balance between the coordinate branches, the proper inquiry focuses on the extent to which the Act "prevents the Executive Branch from accomplishing its constitutionally assigned functions." *Id.*[13] The "Court has thus been mindful that the boundaries between each branch should be fixed 'according to common sense and the inherent necessities of the governmental co-ordination,'" *Chadha*, 463 U.S. at 962 (Powell, J., concurring) (quoting *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928)).

The Court has noted that a "hermetic sealing of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." *Buckley v. Valeo*, 424 U.S. at 121. "Rather, as Justice Jackson wrote: 'While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed

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[12] *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also Chandler v. Florida*, 449 U.S. 560, 579 (1981); *Reeves, Inc. v. Stake*, 447 U.S. 429, 441 (1980); *Whalen v. Roe*, 429 U.S. 589, 597 & n.20 (1977).

[13] Moreover, even "where the potential for disruption is present," the court may reach the conclusion that "that impact is justified by an overriding need to promote objectives within the constitutional authority of Congress." *Id.; see also Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.'" *Chadha,* 462 U.S. at 962 (Powell, J., concurring), (quoting *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 635 (1952) (concurring opinion)).

This Court's rejection of the "archaic view" tracks the pronouncements of the Framers. If the three branches of government were rigidly and archaically separated, checking and balancing by means such as an independent Comptroller would be impossible. When the idea of a rigidly pure separation was suggested to the Framers and debated by them, they consciously rejected it as impractical and unreasonable.[14] Recent commentators have emphasized that "[b]y the time of the Philadelphia convention the doctrine of separated powers had been modified to allow for checks and balances."[15] As Madison explained, checks and balances did not mean "that these departments ought to have no *partial agency* in, or *controul* over the acts of each other." *Id.* at 325 (emphasis in original). Rather, "the whole power of one department [should not be] exercised by the same hands which possess the whole power of another department." *The Federalist,* No. 47, at 325-26 (J. Madison) (J. Cooke ed. 1961) (quoting Montesquieu). Madison's view accorded the Branches "a degree of interdependence." [16]

This is especially true in a case such as this where the challenged Act does not run afoul of any specific constitutional prohibition. In other recent separation of powers cases, the challengers to the enacted statutes were not required to make highly strained attacks, but could point to specific textual constitutional prohibitions. This Court required the challengers to rebut the "presumption that the challenged statute is valid." *Chadha,* 462 U.S. at 944. *See*

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[14] *See The Federalist,* No. 51 (J. Madison) (J. Cooke ed. 1961).

[15] L. Fisher, *Constitutional Conflicts Between Congress and the President* 14 (1985).

[16] Levi, *Some Aspects of Separation of Powers,* 76 Colum. L. Rev. 371, 378 (1976).

also Rostker v. Goldberg, 453 U.S. 57, 64 (1981). To overcome this presumption of validity, which serves as an important safeguard assuring that those selected by the American people to set national policy can, in fact, do so, this Court relied on "[e]xplicit and unambiguous provisions of the Constitution . . . ." *Chadha,* 462 U.S. at 944.

In *Chadha* and the two other recent occasions, *Buckley v. Valeo* and *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.,* 458 U.S. 50 (1982), where this Court was required to reject as unconstitutional, on separation of powers grounds, the policy determinations made by the political branches, the Court was faced with crystalline direction from the Constitutional Convention rather than the textual silence found here.[17]

No specific constitutional provision bars this Act. Instead, the challengers rely on attenuated inferences from a mixture of various clauses, none of which directly addresses this Act. With respect to the Appointments Clause, art. II, sec. 2, cl. 2, J.A. 92, the President, with the advice and consent of the Senate, properly appoints the Comptroller General. The challengers claim to find implied restrictions in that Clause which control this case, regarding removal, rather than appointment, but their argument is strained. This Court has repeatedly held that the interpretive maxim that treats "removal as incident to the power of appointment, unless otherwise

[17] In *Chadha,* the Court noted that the requirements of bicameralism and presentation to the President, the explicit constitutional provisions found to be violated, "were considered so imperative that the draftsmen took special pains to assure that these requirements could not be circumvented." *Chadha,* 462 U.S. at 946–47. *Buckley v. Valeo,* 424 U.S. at 124, recognized that the Court's separation of powers analysis was to be undertaken "in the context of these cognate provisions of the document . . . ." With similar adherence to requirements explicitly found within the four corners of the Constitution's text, the plurality opinion in *Marathon,* 458 U.S. at 58, found the Bankruptcy Act of 1978 constitutionally infirm in that it transgressed an "unambiguously enunciate[d] . . . . fundamental principle" found in the text of Article III.

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provided," *Reagan v. United States,* 182 U.S. 419, 426 (1901), as applied to the Appointments Clause, simply does not by itself prohibit Congress from defining removability as it enacts the laws creating and defining all offices not provided for in the Constitution. In fact, *Myers* itself emphasized that the Appointments Clause does not control removals.[18]

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[18] *Myers* recites the maxim quoted above from *Reagan v. United States,* with the same limitation that it applies "[i]n the absence of any specific provision to the contrary," *Myers,* 272 U.S. at 26.

The Appointments Clause includes two specific provisos: Senate participation in appointments and Congressional authority to specify alternative appointment methods for inferior officers. Each of these provisos has contributed to the Court's reluctance to find a removal power in the express language of the Appointments Clause. In *Myers,* the Court recognized that the laws creating Mr. Myers' office could require Senate participation in the appointment of Mr. Myers. With the appointment mechanism including the Senate, to infer a removal mechanism directly from that appointment mechanism would have approved a Senate role. As the Court asked:

> Under section 2 of Article II, however, the power of appointment by the Executive is restricted in its exercise by the provision that the Senate, a part of the legislative branch of the Government, may check the action of the Executive by rejecting the officers he selects. Does this make the Senate part of the removing power?

272 U.S. at 119. To avoid this parallel, the opinion strongly distinguished the Appointments Clause's provisions for appointments from removal. "The history of the [Appointments] clause . . . makes it clear that it was not prompted by any desire to limit removals," *Myers,* 272 U.S. at 119; *id.* at 121 ("the power of removal . . . . is different in its nature from that of appointment").

The other proviso, regarding Congressional specification of alternative appointment methods for inferior officers, has discouraged linkage of any Presidential power to remove at will with express language of the Appointment Clause even further. *United States v. Perkins,* 116 U.S. 483, 385 (1886); page 47 *infra.*

Myers has some loose expressions about the Appointments Clause that, if read too broadly apart from the more careful treatment noted above, would serve in an argument that the President can remove judges and quasi-judicial officers at will. However, that reading would directly contradict both *Marbury v. Madison* and *Humphrey's Executor,* as discussed below, and thus is not the law.

Similarly, the generally-worded "executive Power" and "faithful execution" clauses also do not amount to constitutional bars to this Act or to the independent performance of the traditional comptroller function. The former clause simply states that the "executive Power shall be vested in a President of the United States of America." U.S. Const., art. II, sec. 1, cl. 1, J.A. 92. As Justice Jackson explained:

> If [the clause granted such powers,] it is difficult to see why the forefathers bothered to add several specific items [to Article II], including some trifling ones.
>
> The example of . . . unlimited executive power that must have most impressed the forefathers was the prerogative exercised by George III, and the description of its evils in the Declaration of Independence leads me to doubt that they were creating their new Executive in his image. . . . I cannot accept the view that this clause is a grant in bulk of all conceivable executive power. . . .

Youngstown, 343 U.S. at 640–41 (Jackson, J., concurring).

The Constitution's requirement that the Executive shall "take Care that the Laws be faithfully executed," U.S. Const., art. II, sec. 3, J.A. 92 does not constitute a positive sweeping grant of power for the President to take over the independent agencies, but a limit on what the Executive may do with its own powers.[19]

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[19] *Kendall v. United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 613 (1838); *Youngstown,* 343 U.S. at 587 (majority opinion);

> The nature of that [faithful execution] authority has for me been comprehensively indicated by Mr. Justice Holmes. "The duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his powers."

Youngstown, 343 U.S. at 610 (Frankfurter, J., concurring) (citation omitted); *id.* at 646 (Jackson, J., concurring); *National Treasury Employees Union v. Nixon,* 492 F.2d 587, 604 (D.C. Cir. 1974).

The "faithful execution" clause took its inspiration from the English Bill of Rights, enacted after the Stuart Monarch James II was forced

Continued

III.

THE RULE OF *HUMPHREY'S EXECUTOR* IS VALID AND MAKES THE COMPTROLLER GENERAL AN INDEPENDENT OFFICER

A. This act's reason for the GAO role

Although the district court disagreed with the House parties' constitutional conclusions, it conceded the correctness of the legislative history which "the brief of Intervenor Speaker and Bipartisan Leadership Group of the House meticulously details . . . ." J.A. 60. The House floor debate constituted a vigorous and hard-fought battle over this bill before enactment; it illuminates the GAO role better than any abstract analysis can do.

Originally, the Deficit Control Act came from the Senate, in a first version which gave authority to the Presidential and Congressional budget offices; this version was heavily criticized in the House for assigning the key calculations to those offices. See note 7 *supra*. As an alternative, the present GAO role was proposed to the House by Representatives Mack and Cheney, who both

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into exile by the Glorious Revolution of 1688. A major provision of the English Bill of Rights declared "that the pretended power of suspending of laws, or the execution of laws by regall authority, without consent of Parlyament, is illegall." 1 W. & M., sess. 2, ch. 2 (1688).

> "Scholars have concluded that the 'faithful execution' clause of our constitution is a mirror of the English Bill of Rights' abolition of the suspending power [,] that is, the abolition of what the English Bill of Rights had called 'the pretended (Royal) power of suspending' " [the execution of laws.]

Ameron, Inc. v. U.S. Army Corps of Engineers, 610 F. Supp. at 755 (quotation omitted). *See The President's Suspension of the Competition in Contracting Act is Unconstitutional:* H.R. Rep. No. 138, 99th Cong., 1st Sess. 10 (1985); *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 263–67 (1985); *Department of Justice Authorization and Oversight, 1981: Hearings Before the Senate Comm. on the Judiciary*, 96th Cong., 2d Sess. 885–87 (1980); Reinstein, *An Early View of Executive Powers and Privileges: Trial of Smith and Ogden*, 2 Hastings Const. L.Q. 309, 321 (1975)); Stewart, *The Trial of the Seven Bishops*, Cal. St. B.J., Feb. 1980, at 70 (account of the 1688 case underlying the provision).

served as special conferees at large on the conference committee that incorporated the GAO role. Conference Report, *supra* note 1, at 123.

Representative Gephardt, a leading figure in the budget debate, made the chief response for the House Democrats. While he indicated disagreement with some aspects of the Mack-Cheney proposal, he signaled bipartisan support for the GAO role. He did not do so through any contention that Congress would influence or control the GAO, something no Member believed or desired. Rather, he analyzed the GAO role as something more than a mere check on political influence—it was, he said, an absolute "wall," and later Representative Mack emphasized the strength of that wall.[20] In Representative Gephardt's key statement, he made unmistakably clear that the wall Members sought would not merely bar the President, but would take "these decisions *out of the hands of* the President and *the Congress.*" 131 Cong. Rec. H 9846 (daily ed. Nov. 6, 1985) (Rep. Gephardt) (emphasis supplied).[21]

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[20] 131 Cong. Rec. H 11883 (daily ed. Dec. 11, 1985) (Rep. Mack) (statement in support of conference report).

[21] For the place of the Mack-Cheney amendment in the enactment sequence, see page 4 *supra*. Representative Gephardt was the Democratic manager on that amendment. 131 Cong. Rec. H 9844 (daily ed. Nov. 6, 1985) (recognition of Rep. Gephardt for half the time on the amendment). In Representative Gephardt's key statement, he offered to negotiate in a second conference on the first two aspects of the Mack-Cheney amendment ("we are willing to negotiate about th[e] [first] difference," and the second is "one again that we are willing seriously to negotiate about," *id.* H 9846). Then he addressed the GAO role, and he signaled why the House would ultimately accept it after conference, *id.*:

> I feel very strongly that we have a conflict in this proposal. We have two priorities: A lot of our Members, both Republican and Democrat want a wall to be created that takes these decisions out of the hands of the President and the Congress, and I think a lot of Members on our side share the desire to have a wall.

Continued

Just as Representative Gephardt, Chairman of the House Democratic Caucus, analyzed the proposal for his side, so Representative Cheney, chairman of the Republican Policy Committee and an elected leadership officer of the House Republican Party, and a leading figure in the budget debate, analyzed it for that side. In his closing speech on the amendment, Representative Cheney explained why "[w]e have included GAO"; the decision was "based upon the work that the American Law Division has done at the Library of Congress." 131 Cong. Rec. H 9864 (daily ed. Nov. 6, 1985). That statement referred to the American Law Division's analyses of GAO published in connection with the highly visible federal court cases sustaining GAO as an independent agency.[22] Both the Senate and the House parties participated in those cases, which were contemporaneous with the Deficit Control Act debate, and which were also the subject of published committee reports. H.R. Rep. No. 138, *supra* note 19 (Committee on Government Operations); H.R. Rep. No. 113, 99th Cong., 1st Sess. 11-18 (1985) (Committee on the Judiciary).

Not a single statement by *any* Member of Congress—not even a single statement by any of the hundreds of opponents of the Act, many of whom made lengthy and in-

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> However . . . . we need to have that negotiation, and I think it is clearly unacceptable to go back to the Gramm-Rudman procedure, which allows OMB and CBO to make the arbitration. . . [because] we will wind up with OMB being the final arbiter. . . .

[22] Representative Cheney's statement was:

> We have wrestled with the constitutional questions. We have included GAO.
>
> I am personally convinced, based upon the work that the American Law Division has done at the Library of Congress, that this is indeed a constitutional package.

131 Cong. Rec. H 9864 (daily ed. Nov. 6, 1985). *See Constitutionality of GAO's Bid Protest Function*, *supra* note 19, at 646-70 (reprinting lengthy American Law Division analysis of GAO).

tensive critiques [23]—disputed the bipartisan conclusion of Representatives Gephardt and Cheney that the GAO role would "wall" off the calculations from influence by the President *and the Congress.* In fact, the many critics of the bill noted the "unelected" [24] status of GAO, emphasizing that GAO's role meant that the elected Congress would not conduct or control the process.

Even the Executive Branch never claimed during the Act's legislative consideration (in contrast to its post-hoc position for litigation purposes) that the GAO's role would be controlled by Congress.[25] On the contrary, the Executive made a series of strong endorsements of the Act, to which the proponents of the Mack-Cheney proposal referred explicitly. Never once during the legislative consideration were these endorsements tempered by any

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[23] *See, e.g.*, 131 Cong. Rec. S 17404-06 (daily ed. Dec. 11, 1985) (lengthy critique by Sen. Glenn); *id.* H 11884-85 (Rep. Scheuer) (same); *id.* H 11885-86 (Rep. Rodino) (same).

[24] *See, e.g.* 131 Cong. Rec. H 11885 (daily ed. Dec. 11, 1985) (Rep. Scheuer) (noting GAO as "unelected"); *id.* H 11888 (Rep. Waxman) (same); *id.* H 11888 (Rep. Conte) (same); *id.* H 11901 (Rep. Mineta) (same).

[25] Early on, when the Director of OMB was repeatedly pressed during hearings to discuss constitutional concerns, he explained that the President strongly endorsed the bill, that the Administration had not produced any writings at all on the subject, and that there were some concerns about CBO—not GAO—which should be taken care of by a severability clause. *Government Operations Hearings, supra* note 4, at 100-02 (exchange between Rep. Synar and OMB Director Miller).

During the entire critical month of November, after the Senate adopted a GAO role in its second version, and as the conference committee worked on the proposal for a GAO role, when the President's support was absolutely crucial to the progress of the legislation, the Executive did not issue a single statement questioning GAO's role in this Act. Had there been any, opponents would have emphasized it heavily. See note 24 *supra* (lengthy critiques without intimation of any such Executive questioning).

Later, when the President signed the bill into law, he issued a post-hoc signing statement questioning GAO.

statement on the public record questioning the constitutionality of a GAO role in this Act.[26]

On this record, it is astonishing that the challengers attempt to invoke *Chadha* and *Buckley,* where Congress expressly exercised control over agencies through legislative vetoes and appointment of officers, to depict this Act as a Congressional scheme to take control. In sum, the record shows that during the months of consideration of this matter, not one Member of Congress, whether supporter or opponent, and not one Executive spokesman, contended that Congress would control GAO or that a GAO role was unconstitutional. Not one disputed the proponents' view that GAO's role would "wall" off Congress.

B. The appropriateness of independence for the Comptroller function and the soundness of *Humphrey's Executor*

The House parties will return later, after laying a proper historical predicate, to the incorrect charge that Congress controls the Comptroller General's calculations for this Act. However, first the challenge to whether *Humphrey's Executor* is good law, and to whether it sustains the Comptroller General's exercise of his traditional functions, should be addressed. The Executive Branch has attacked the GAO based on criticisms of *Humphrey's Executor* as a figment of 1930's "political science preconceptions." J.A. 68. Of course, even the district court drew back from "disregarding the rationale," J.A. 70, of so fundamental a precedent for the structure of the government as the unanimous decision in *Humphrey's Executor.* However, the Executive has not drawn back from such an assault.

The Executive's direct assault calls for a recapitulation of the powerful weight of constitutional history sustaining *Humphrey's Executor* and the Comptroller's independence in the performance of his traditional functions.

[26] *See, e.g.,* 131 Cong. Rec. H 11879 (daily ed. Dec. 11, 1985) (Rep. Cheney) ("let me begin my remarks by reminding . . . that the conference report that is before us tonight has the support of the President. He has endorsed it . . . ."); *id.* (Rep. Martin).

1. The Constitutional History of Independence For the Comptroller

The Comptroller's history long foreshadowed his central importance today as an independent check on Executive impoundments and procurement. The Constitution's strict commandment of the power of the purse, that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const., art. I, sec. 9, cl. 7, J.A. 91, implied the necessity for an independent check on the Executive, as the Framers knew well from the historic struggles by the House of Commons and colonial legislatures to confine the Executive to duly appropriated expenditures.

History taught the Framers the vital need for an independent comptroller's quasi-judicial balance—both between the Executive and the individual, as described in *Murray's Lessee v. Hoboken Land and Improvement Co.*, 59 U.S. (18 How.) 272, 277–80 (1856), and between the Executive's desires and the power of the purse. As the Framers knew, in 1785—just two years before the Constitutional Convention—the great Edmund Burke and William Pitt had culminated a century of reform in Parliament's power of the purse. They had established independent commissioners to exercise the comptroller function, who held office with tenure like judges, appointed by the Executive (the Crown) but made independent by not being removable during good behavior.[27]

[27] An Act for better examining and auditing the Publick Accounts of this Kingdom, 25 Geo. III, ch. 52 (1785) (revising a 1780 act, and providing for officers who "shall be stiled, *The Commissioners for auditing the Publick Accounts,* and shall hold their officers *quam diu se bene gesserint*" (emphasis in original) (even using the same Latin term that protected the tenure of the British predecessors of the Article III judge, *see United States v. Will,* 449 U.S. 200, 218 (1980)).

See H. Roseveare, *The Treasury 1660–1870* 53, 56, 59, 61 (1973) (evolution in 1600s and 1700s); *see id.* 62–63 (1785 act). Specifically, on the eve of the Philadelphia Convention, the Framers saw the meaning in Britain of the power of the purse when they watched the creation:

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The creation of independent commissioners was a key step in the evolution of Britain's modern independent Comptroller and Auditor General, of independent comptrollers throughout the world, and of our own Comptroller.[28] Similarly, in 1781 the Continental Congress insisted on an independent quasi-judicial Comptroller removable only for cause.[29] On the eve of the Philadelphia conven-

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> in 1785 [of] a board of five members, whose status was made as independent as possible of the executive. They were appointed by the Crown under the authority of Parliament and held office during good behavior. Here was a real provision for a regular audit. . . .

B. Chubb, *The Control of Public Expenditure* 19 (1952) (footnote omitted).

[28] *See* R. Berger, *Executive Privilege: A Constitutional Myth* 113 (1974) (tracing Constitution's provision regarding power of the purse to British roots); McGuire, *Legislative or Executive Control Over Accounting for Federal Funds*, 20 Ill. L. Rev. 455, 466–68 (1926) (tracing Comptroller General removability provision to same roots).

See, e.g., the law in Britain, Australia, Canada, India, Ireland, Jamaica, and New Zealand: Exchequer and Audit Departments Act of 1866, 29 & 30 Vict., ch. 39, § 3 (as amended) (the "Comptroller and Auditor General . . . shall hold [his] office[] during good behaviour"); Audit Act of 1901 (as amended), § 7(1), Austl. Acts P. ("The Auditor-General shall hold his office during good behaviour. . . ."); Auditor General Act, Ch. 34, § 3 (1), 1976–77 Can. Stat. 931 ("the Auditor General of Canada [is] to hold office during good behaviour for a term of ten years"); India Const., art. 148(1) ("There shall be a Comptroller and Auditor-General of India who . . . shall only be removed from office in like manner and on the like grounds as a Judge of the Supreme Court"); Ireland Const., art. 63 ("[T]he Comptroller and Auditor General shall not be removed from office except for stated misbehaviour or incapacity"); Jamaica (Constitution) § 121(3), as reprinted in XX Jam. Rev. Laws 142 (1980) ("The Auditor-General may be removed from office only for inability to discharge the functions . . . or for misbehaviour"); Public Finance Act, No. 65, § 20, 1977 N.Z. Stat. 646 ("the Controller and Auditor-General may be removed or suspended from his office only . . . for disability, bankruptcy, neglect of duty, or misconduct").

[29] In 1781, as Robert Morris became Superintendent of Finance, "the officers of the treasury were to be an assistant superintendent, a comptroller," and others, C.J. Bullock, *The Finances of the United*

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tion, a number of the new states had established comptrollers to pass on government claims or disbursements; today, every state has a Comptroller or Auditor, and most are independent from executive (gubernatorial) will.[30] In sum, British, state, and federal history all show that to the Framers, as to the English-speaking world today, the Article I power of the purse necessarily implied a comptroller performing his traditional functions independent of the Executive will.

The Framers revealed most clearly their constitutional understanding when James Madison discussed, in the First Congress, the structure for Treasury operations. When the Congress convened in New York in 1789, Madison argued successfully, as the living voice of the Philadelphia convention two years earlier, on the one hand, that an officer such as the Secretary of Foreign Affairs should be responsible solely to the President's will, and hence subject to removal at will. *See Myers v. United States,* 272 U.S. at 111–31. On the other hand, when the

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States from 1775 to 1789 201 (1985 ed. reprinted 1979); L.M. Short, *The Development of National Administrative Organization in the United States* 67 (1923). The committee reporting Treasury legislation specified that removal by the superintendent of subordinates would be "for incapacity, negligence, dishonesty or other misbehaviour," XIX J. Continental Cong. 432 (1912 ed.) (entry of Apr. 21, 1781). As provided by "An Ordinance for Regulating the Treasury, And Adjusting the Public Accounts," enacted Sept. 11, 1781, XXI J. Continental Cong. 948–49 (1912 ed.):

> When an account is audited . . . it shall be reported to the comptroller, and any person who shall think himself aggrieved by the judgment of the auditor, shall have a privilege of appealing, within fourteen days, to the comptroller. In all such appeals the comptroller shall openly and publicly hear the parties, and his decision shall be conclusive.

[30] *Merchants' Warehouse Co. v. Gelder,* 349 Pa. 1, 36 A.2d 444, 450 n. 7 (1944) (quoting 1782 and 1785 Pennsylvania acts); *Commonwealth v. Pierce's Administrator,* 25 Va. (4 Rand.) 432 (1826) (quoting early Virginia acts); *Dowe v. Egan,* 48 A.2d 735, 740 (Conn. 1946) (quoting 1786 Connecticut act). The provisions today are collected in *Constitutionality of GAO's Bid Protest Function, supra* note 19, at 465–85 (1985) (reprinting study by Duncan Hollomon, Congressional Research Service).

First Congress took up the Treasury a week later, Madison distinguished the Comptroller's function as entirely different. As the Supreme Court later noted:

> [when] the tenure of office for the Comptroller of the Treasury was under consideration, Mr. Madison quite evidently thought that, since the duties of that office were not purely of an executive nature but partook of the judiciary quality as well, *a different rule in respect of executive removal might well apply.* 1 Annals of Congress, cols. 611–612.

Humphrey's Executor, 295 U.S. at 631 (emphasis supplied).

Specifically, Madison explained the need for "the independent officers of Comptroller and Auditor." 1 Annals of Cong. 393 (J. Gales ed. 1789). Madison elaborated, respecting the tenure by which the Comptroller was to hold his office:

> It will be necessary, said he, to consider the nature of this office . . . [and] in analyzing its properties, we shall easily discover they are not purely of an Executive nature. It seems to me that they partake of a Judiciary quality as well as Executive; perhaps the latter obtains in the greatest degree. The principal duty seems to be deciding upon the lawfulness and justice of claims and accounts subsisting between the United States and particular citizens: this partakes strongly of the judicial character . . . .

1 Annals of Cong. 611–12 (J. Gales ed. 1789). Madison concluded from these functions that "there may be strong reasons why an officer of this kind should not hold his office at the pleasure of the Executive branch of the Government." *Id.* at 612.[31]

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[31] Later, he reiterated:

> [T]he nature of this office [of Comptroller] differed from the others upon which the House had decided. . . .
>
> Several arguments were adduced to show the Executive Magistrate had Constitutionally a right to remove subordinate officers at pleasure. . . . [B]ut I question very much whether [the President] can or ought to have any interference in the

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The Supreme Court confirmed distinctions like Madison's as a matter of fundamental constitutional law in *Marbury v. Madison,* 5 U.S. (1 Cranch) 137 (1803). That case concerned, of course, whether William Marbury could mandamus the Secretary of State to provide his commission as justice of the peace for the District of Columbia. In that most historic opinion, Chief Justice Marshall noted, and agreed with, the First Congress's view regarding the Secretary of Foreign Affairs as a tool of the President's will. *Id.* at 165–66. Chief Justice Marshall recognized, in contrast, an entirely different status for Marbury: an officer who, although not an Article III judge (having only a five-year term), nevertheless had been appointed to an office with a fixed term and quasi-judicial functions. *Marbury v. Madison* elaborates regarding the non-removability of such an officer:

> Mr. Marbury . . . was appointed; and as the law creating the office, gave the officer a right to hold for five years, independent of the executive, *the appointment was not revocable,* but vested in the officer legal rights, which are protected by the laws of his country.

5 U.S. (1 Cranch) at 162 (emphasis supplied).

There is no doubt that Chief Justice Marshall pronounced repeatedly with deliberation and care, as a matter of importance in the case, that a quasi-judicial officer with a fixed term could hold office and "not [be] removable at the will of the executive." *Marbury v. Madison,* 5 U.S. (1 Cranch) at 162; *accord, id.* at 167 ("not removable at the will of the president"). After *Marbury,* the Congress concluded that it could determine whether to confer protections against Presidential removal upon officers with mixtures of judicial and quasi-legislative functions, such as the judges of legislative courts. In *McAllis-*

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settling and adjusting the legal claims of individuals against the United States.

Id. at 614.

ter v. United States, 141 U.S. 174 (1891), the Court reviewed *Marbury v. Madison* and supported that view.[32]

Thus, in the nineteenth century, both the rulings of this Court, and the Comptroller's relationship with the President, reflected the Framers' understanding of the need for an independent quasi-judicial Comptroller. As Justice Brandeis noted, a review of the extensive statutory history regarding the "[s]teps in [the Comproller's] growth and in the development of [his] control over government expenditures" show that "[t]he decision of the Comptroller General upon the allowance of accounts within his jurisdiction is conclusive upon the executive branch of the government." *United States ex rel. Skinner & Eddy Corp. v. McCarl,* 275 U.S. 1, 133-34 n.1 (1927).[33]

The lower courts at an early date, and this court in *Kendall v. United States ex rel. Stokes,* 38 U.S. (12 Pet.) 524, 638 (1838), confirmed that Congress could prescribe duties for officers to perform independent of the President's will. *See Butterworth v. United States ex rel. Hoe,* 112 U.S. 50, 67 (1884) (independence of quasi-judicial functions).[34] Accordingly, the early Presidents and their At-

[32] The Court recalled that in *Marbury,* "the chief justice asserted the authority of Congress to fix the term of a justice of the peace in the District of Columbia beyond the power of the President to lessen it by his removal," *id.* at 189. The *McAllister* Court distinguished between statutes in which Congress stated or implied that the President could remove at will the judges of particular territorial courts, and other statutes which precluded removal, noting as to the latter that "it was competent for Congress to prescribe the tenure of good behavior," *id.* at 186.

[33] *Accord, St. Louis, B. & M. Ry. Co. v. United States,* 268 U.S. 169, 174 (1925); *United States v. Harmon,* 147 U.S. 164, 167 (1893). For the nineteenth-century view of the comptroller's quasi-judicial functions, *see, e.g., Murray's Lessee,* 59 U.S. (18 How.) at 272, 280 ("[t]hat the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted"); W.E. Hotchkiss, *The Judicial Work of the Comptroller of the Treasury* (1911).

[34] *Gilchrist v. Collector of Charleston,* 10 F. Cas. 355, 356, 363 (C.C.D.S.C. 1808) (No. 5,420); *United States v. Smith and Ogden,* 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,341a). *See* II G.L. Haskins &

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torneys General respected the final and conclusive nature of the Comptroller's independent decisions, disclaiming any power to control those decisions.[35]

2. The Comptroller's 1921 Charter

Late in the nineteenth century, the respect accorded the Comptroller's independence by the early Presidents and Attorneys General was abandoned. In a key incident shaping the provisions of the 1921 Act which are central to this case, President Cleveland used the threat of removal to obtain the subservience of the hitherto independent Comptroller. At first, as Solicitor General Beck described in Congressional testimony, President Cleveland's acting Comptroller had been independent like his predecessors:

> I am told that during the first Administration of President Cleveland, when Mr. Garland was Attorney General, the officer who exercised the powers afterwards conferred upon the Comptroller of the Treasury declined to follow an opinion of the Attorney General.[36]

H.A. Johnson, *History of the Supreme Court of the United States* 298–304 (1981) (*Gilchrist* case); Grundstein, *Presidential Power, Administration and Administrative Law*, 18 Geo. Wash. L. Rev. 285, 309–21 (1950); note 19 *supra* ("faithful execution" requirements, and account of *Smith and Ogden* case).

[35] Among the Presidents who expressly foreswore control were President Polk and President Jackson, (who wrote on an 1833 report, "[t]he decision of the Second Comptroller is final, over whose decisions the President has no power . . . .") *quoted in* McGuire, *supra* note 28, 20 Ill. L. Rev. at 464; H.C. Mansfield, *The Comptroller General* 99 n.18 (1939) (adding President Tyler to Jackson and Polk). Attorneys General agreed. 1 Op. Att'y Gen. 624 (1823); *id.* 678 (1824); *id.* 705 (1825); 2 *id.* 480 (1831); *id.* 507 (1832); *id.* 544 (1832); 4 *id.* 515 (1846); 5 *id.* 630 (1852) (surveying prior opinions).

[36] Statement of James M. Beck, Solicitor General, at a Hearing of the Committee on the Judiciary of the House of Representatives 24 (May 27, 1924) (hearings unpublished; statement published by the Government Printing Office as a separate print). The details of the incident were separately verified in H.C. Mansfield, *supra* note 35, at 60 & n.97.

There then ensued the nineteenth-century equivalent of the Saturday Night Massacre, only at that time, the threat of Presidential removal succeeded in destroying the officer's independence:

> Mr. Garland brought the matter to the attention of the President, who summoned the officer and told him, in substance, that the Attorney General was the legal adviser of the President and of the heads of the executive departments, and that if the Comptroller was unwilling to be guided by his advice his resignation would be at once accepted. After that interview the Comptroller saw the matter in a different light.

Id. Thereafter, "the Comptroller . . . was disposed to follow the opinions of the Attorney General," *id.*, reducing his quasijudicial independence to a mere echo of the departments he was ostensibly checking.

The problem came to a head during the early twentieth-century movement for budget reform, which consistently recognized the traditional functions of the Comptroller General as quasi-judicial.[37] Congress sought to repair the damage that had been done to the Comptroller's independent performance of his checking function. Representative Good, the chief proponent and House manager of the budget reform bills of 1919–21, repeatedly reminded the Congress of the effect of the removal threats made by President Cleveland against the Comptroller.[38] Noting that the reform bills transferred the functions of the Comptroller of the Treasury, and associated auditors, to the Comptroller General, Representative Good followed the historic recognition that such functions

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[37] *See, e.g.*, H.R. Doc. No. 670, 62d Cong., 2d Sess. 404 (1912) (report of Presidential Commission on Economy and Efficiency, key source for the budget reform act) ("It is well known that the duties of the accounting officers of the Treasury, in contemplation of law, are quasi judicial").

[38] 59 Cong. Rec. 8610, 8613 (1920); 61 Cong. Rec. 982 (1921) (Rep. Good) (opening floor statement for the budget bill) (describing President Cleveland incident in detail).

were, as he put it, "semijudicial." [39] To those functions, the reform bills added a second, quasi-legislative function, that of investigating and reporting to Congress regarding expenditure abuse. This function also clearly required independence. As Representative Good elaborated:

> If we allow this official to be removed by the President any time he desires, then that official in the future will not criticize the expending department any more than he has criticized it in the past, and the record is silent practically of any criticism from this source in the past.

61 Cong. Rec. 983 (1921); *see* 59 Cong. Rec. 9245 (1920) (Rep. Andrews).

Accordingly, the committees which reported the budget bill, and the floor proponents, expressed repeatedly their desire to make the Comptroller "independent".[40] The bill as enacted provided for the President to appoint the Comptroller, subject to Senate confirmation, to a fifteen-year term. It included a number of measures to secure independence, including freedom from Presidential removal at will. J.A. 93–95. When the President vetoed one version because of the removability provision, Congress reexamined the matter. Congress dropped the prior provision for removal by two-House concurrent resolution, and instead provided for removal by a public law, enacted with presentation to the President, consistent with the rule this Court later laid down in *Chadha*. The President approved this version, signing it into law without objection. See page 45 *infra*.

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[39] 61 Cong. Rec. 984 (1920) (Rep. Good) ("semijudicial"); *id.* 1079 (Rep. Good) ("semijudicial"); *id.* 1084 (Rep. Fess) ("an element of the judicial").

[40] *See, e.g.*, H.R. Rep. No. 362, 66th Cong., 1st Sess. 9 (1919) ("absolutely independent," "semijudicial"); S. Rep. No. 524, 66th Cong., 2d Sess. 6, 13 (1920) ("independent"); H.R. Rep. No. 1044, 66th Cong., 2d Sess. 13 (1920) (conference report) ("independent").

3. *Humphrey's Executor,* Overruling *Myers,* Confirmed The Comptroller's Independence

For a brief period, the sweeping Executive power doctrine of Chief Justice (and former President) Taft in *Myers v. United States* impaired the Comptroller General's independence. *Myers'* holding is not at issue in this case. The essential holding was that the President could remove at will officers with purely executive functions, such as the Secretary of State. As the opinion stated, the President's "cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence [in one] . . . he must have the power to remove him without delay." 272 U.S. at 134. This rule extended to Mr. Myers, the postmaster whose removal was at issue in that case, as an officer whose duties were purely executive, rather than quasi-legislative or quasi-judicial and thus requiring independence.

However, of direct pertinence to the Comptroller was Taft's dictum that removability at will was appropriate, *Myers,* 272 U.S. at 135, even for a comptroller whose actions were quasi-judicial and could not properly be directly controlled or reversed. In Taft's view, "[t]he President may remove the comptroller, [even though] he cannot reverse his decision."[41] Chief Justice Taft recognized that

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[41] Taft, *The Boundaries Between the Executive, the Legislative and the Judicial Branches of the Government,* 25 Yale L.J. 600, 604 (1916); *see* W.H. Taft, *Our Chief Magistrate and His Powers* 81 (1916):

> [C]onsider the drawing of money from the Treasury Department under an appropriation act. The drawing of the warrant must be approved by the Comptroller of the Treasury. It is for him to say how the appropriation act shall be construed and whether the warrant is lawful and whether the money can be drawn. . . . If the President does not like him as a Comptroller, he can remove him . . . but under the act of Congress creating the office, the President cannot control or revise the decisions of this officer. His work is like the work I have referred to, quasi-judicial.

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his view was inconsistent with the previously described doctrine of *Marbury v. Madison*, see page 29 *supra*, and so he attempted to overrule *Marbury* on this point. *Id.* at 139–41 (overruling *Marbury*).

Classic dissenting opinions of Justices Holmes, Brandeis, and McReynolds rebutted the view of Chief Justice Taft. These "Great Dissenters" recognized, as did many commentators, that Presidential removability at will for quasi-judicial officers unsoundly struck at both the independent regulatory commissions and the Comptroller General.[42] They did not rely on "political science preconceptions" of the 1930s, as the challengers would have it, but on extensive constitutional scholarship including thorough surveys of this Court's precedents, the Framers' views, over a century of statutes, Madison's 1789 discussion of the Comptroller and *Marbury v. Madison.*[43]

Only nine years later in *Humphrey's Executor*, the Court reconsidered the *Myers* language regarding officers such as the Comptroller, and expressly overruled it. The President had removed a member of the Federal Trade Commission, and challenged the statute protecting the commissioners from removal at will as unconstitutional. *Myers'* language that officers with quasi-judicial and quasi-legislative functions had to be removable at will—language referring to the comptroller function—was overruled:

Compare Myers, 272 U.S. at 135 ("there may be duties of a quasi-judicial character . . . the discharge of which the President can not in a particular case properly influence or control.").

[42] *Myers*, 272 U.S. at 181, 188 (McReynolds, J., dissenting) (independent regulatory commissions and Comptroller General); *id.* at 262–64 (Brandeis, J., dissenting) (independent regulatory commissions and Comptroller General); *see, e.g.*, Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 356–57 (1927).

[43] *Myers*, 272 U.S. at 212–13, 215–20 (McReynolds, J., dissenting) (*Marbury* and legislative courts); *id.* at 242 & n.4, 255–56 n.21 (Brandeis, J., dissenting) (*Marbury*, Madison in 1789 regarding Comptroller).

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime.

Id. at 629. For this point, the Court relied specifically on Madison's statement regarding the Comptroller and *Marbury v. Madison. Id.*

Applying this functional analysis, the Supreme Court analyzed the FTC's functions to see if they were quasi-judicial and quasi-legislative (as the opinion itself noted that the Comptroller's function " 'partook of the judiciary quality,' " *id.* (see quotation on page 28 *supra*)). The Court found those qualities evident in the FTC's functions, as they are in the Comptroller General's:

> The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control.

Id. at 628. Much as this Court recently recognized with perfectly consistency that "[t]he GAO is an independent agency within the legislative branch that exists in large part to serve the needs of Congress," *Bowsher v. Merck & Co.,* 460 U.S. at 844—for how else can an officer be made sufficiently independent of the Presidential sword of removal—so the *Humphrey's Executor* court recognized the FTC could legitimately perform its functions as an independent "agency of the legislative . . . department[ ] of government." *Humphrey's Executor,* 295 U.S. at 628.

4. *Buckley v. Valeo, Wiener* and Fifty Years of Legislative Consideration Confirm *Humphrey's Executor*

Since every court to consider the GAO's constitututionality up to now has upheld it pursuant to *Humphrey's Executor,* the challengers have mounted an assault on *Humphrey's Executor.* The challengers asserted that its rule has undergone "considerable shifts over the course of time . . . [and that] [i]t is not clear, moreover, that these shifts are at an end." J.A. 68. This assertion misreads this Court's rulings in the 1950s and 1970s and fifty years of legislative consideration.

a. *Wiener* and *Buckley v. Valeo*

Humphrey's Executor stated its rule for a unanimous Court, a major feat reflecting the stature of the prior opinions of Justices Holmes and Brandeis in *Myers.* In two major opinions, as well as other minor opinions,[44] this Court has revisited the issue in depth. Each time, the Court has unanimously reaffirmed the rule.

In *Wiener v. United States,* Justice Frankfurter, speaking for a unanimous Court, analyzed a removal by the President of an officer of an independent commission. He began, as the House parties have here, by reviewing the unsoundness of the "short-lived" views on the issue in *Myers,* and the correctness of *Humphrey's Executor. Wiener,* 357 U.S. at 352. The Court then analyzed the removed official's function of deciding claims against government-held funds—a function that, as described above, has been at the heart of the Comptroller's role since 1789. The Court drew the "*a fortiori*" conclusion that it could not "have hang[ing] over the Commission the Damocles' sword of removal by the President." *Id.* at 356.

Most recently, in 1976, the Court revisited the issue in *Buckley v. Valeo.* In reviewing the disputed appointment method for Federal Election Commission members, the Court examined the Comptroller General's status. It re-

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[44] *See Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.,* 333 U.S. 103, 108-09 (1948).

jected the suggestion that he was an "officer of the Congress" like the House Clerk:

> Ranking nonmembers, such as the Clerk of the House of Representatives, are elected under the internal rules of each House and . . . are "officers of the Congress." . . . But . . . the Comptroller General is appointed by the President in conformity with the Appointments Clause.

Id., 424 U.S. at 128 & n. 165 (footnotes and quotations omitted). The Court then reaffirmed that independent agencies could constitutionally perform all their traditional functions. See page 12 *supra.*

b. Fifty Years of Legislative Consideration

Humphrey's Executor, like the dissents in *Myers,* built on almost a century and a half of legislative consideration of the need for certain functions to be performed independently. In the fifty years since *Humphrey's Executor,* Congress has continued to give exceptionally close consideration to the issue of independence. This history of careful consideration establishes in the most concrete fashion that the rule of *Humphrey's Executor* represents a vital and living principle in our government rather than, as the challengers would have it, a dated "political science preconception[ ]," J.A. 68.

Since the 1930s, the political Branches have wrestled with a major dilemma of modern regulation: the unavoidable need for federal supervision of an increasingly unified national economy, while keeping at bay the appearance of political manipulation of such extraordinarily sensitive aspects of our society as the broadcast media, monetary policy, and the labor-management balance. Based on *Humphrey's Executor,* Congress, almost universally in legislation with Presidential approval, resolved that dilemma by vesting the quasi-judicial and quasi-legislative regulatory activity, and incidental functions, for some of these sensitive matters in independent regulatory agencies. In setting up the NLRB, for example, Congress concluded:

> The Board as contemplated in the bill is in no sense to be an agency of the executive branch of the Government. It is to have a status similar to that of the Federal Trade Commission, which, as the Supreme Court pointed out . . . is a quasi-judicial and quasi-legislative body. . . . [A provision so stating] is desirable in the light of the decision of the Supreme Court in [*Humphrey's Executor*]. . . .

H.R. Rep. No. 1371, 74th Cong., 1st Sess. 4 (1935).

Moreover, Congress has given intense consideration to the issue of independence in at least five different waves of legislative scrutiny and action over the past fifty years. Each time, it has reaffirmed the basic necessity for independence, while fine-tuning the details to allow Presidents a message of coordination. Soon after *Humphrey's Executor,* President Roosevelt named a Committee on Administrative Management, the Brownlow Committee, to examine, *inter alia,* the independence issue. Its proposal that all the independent commissions be abolished and their functions assigned to executive branch departments [45] was set before the Congress in the Executive Reorganization bill of 1938, and debated extensively. Ultimately, Congress rejected the proposal as involving undue centralization of power in the Presidency,[46] but Congress did give the President's budget office authority to coordi-

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[45] *Separation of Powers and the Independent Agencies: Cases and Selected Readings,* S. Doc. No. 49, 91st Cong., 1st Sess. 371 (1970) (reprinting a Brownlow committee report); L. Fisher, *The Politics of Shared Power: Congress and the Executive* 153, 170–71 (1981); Bernstein, *Independent Regulatory Agencies: A Perspective on Their Reform,* 400 *Annals* 14, 15 (1971); Senate Comm. on Governmental Affairs, 5 *Study on Federal Regulation,* S. Doc. No. 26, 95th Cong., 1st Sess. 14 (1977) ("*Senate Regulation Study*").

[46] The proposal was linked publicly with the ill-fated plan to "pack" this Court, contributing to the sense of excessive centralization of power. *Senate Regulatory Study, supra* note 45, at 16. For a discussion of the debate, see D. Morgan, *Congress and the Constitution: A Study of Responsibility* 188–97 (1966).

nate independent agency budget requests and legislative proposals.[47]

Extensive Congressional consideration continued in the 1940s, 1950s, and 1960s. The First and Second Hoover Commissions issued in 1949 and 1955, respectively, reports regarding the independent agencies.[48] Similarly, in 1960, James Landis, an expert on administrative law, prepared for President-elect Kennedy the "Report on Regulatory Agencies," proposing to correct agencies' "fundamental problems" in part by closer coordination with the White House. S. Doc. No. 49, *supra* note 45, at 1311, 1390–93. Each of these reports brought waves of Congressional hearings, reports, and legislation. Successive Presidents moved to implement these studies by proposing reorganization plans for the independent agencies. Congress responded by reaffirming the independence of the agencies in general, and the FCC, with its sensitive First Amendment mandate, in particular, from political control; however, Congress authorized another measured degree of Presidential coordination, by permitting Presidents to pick the agency chairmen, and, in turn, concentrating authority within the agencies in the chairmen.[49]

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[47] Reorganization Act of 1939, section 201, 53 Stat. 564, 565; *see* L. Fisher, *supra* note 45, at 164; *Senate Regulatory Study, supra* note 45, at 16.

[48] L. Fisher, *supra* note 45, at 171; Bernstein, *supra* note 45, at 16–18.

[49] Congress selectively worked through a large number of reorganization plans, accepting some, and rejecting others. Following the First Hoover Commission Report of 1949, numerous reorganization plans were offered. In 1950 alone, seven reorganization plans involving independent regulatory agenices were proposed; three of the seven were rejected. *See* 96 Cong. Rec. 6886, 7173, 7177 (1950) (rejection of plans for NLRB, ICC, FCC); L. Fisher, *supra* note 45, at 162; 64 Stat. 1264–66 (1950) (plans accepted for FTC, SEC, FPC, and CAB).

In the 1960s, following the Landis report, President Kennedy submitted reorganization plans for seven agencies. Four were accepted, three were rejected. *See* 107 Cong. Rec. 10462, 11003, 13078 (1961) (rejection of plans for FCC, SEC, and FCC); 75 Stat. 837–40 (1961) (plans accepted for CAB, FTC, FHLLB, FMC).

In the 1970s and 1980s came what has been, perhaps, the most extensive consideration of the issue. In 1971, came the report of the President's Advisory Council on Executive Organization, *A New Regulatory Framework: Report on Selected Independent Regulatory Agencies* 116–17 (1971), criticizing agencies' "independence and remoteness in practice" from the President. Congress has chosen not to accept regulatory reform proposals that would end independence. Instead, its regulatory reform proposals have suggested a carefully measured relationship between independent agencies and Presidential orders, and its enactments have further fine-tuned agency independence by vesting the President's budget office with limited control over independent agency information-gathering.[50]

In sum, over the last fifty years, there has certainly been no consensus that centralized Presidential control over quasi-judicial and quasi-legislative regulation of independent agencies' sensitive matters is advisable; *a fortiori,* there has been no consensus that this Court should impose that result by constitutional fiat. Rather, Congress has responded to this period of intellectual and legislative ferment[51] by reaffirming the necessity of independence, while working with the Executive Branch whenever its proposals for adjusting the independent agencies' status have been shown to have practical merit.

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[50] Regarding regulatory reform, *see, e.g., Regulatory Reform Act:* S. Rep. No. 305, 97th Cong., 1st Sess. 65–67 (1981) (proposing carefully measured relationship in light of "the independent agencies['] . . . strong concerns"), which represents only one of a lengthy series of hearings, reports, and floor debates on the matter; regarding enactments, see Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164 (1980); Paperwork Reduction Act of 1980, Pub. L. No. 96-511, 94 Stat. 2812; L. Fisher, *supra* note 45, at 168.

[51] The literature reflecting this ferment is enormous. For an introduction, *see, e.g.,* Sargentich, *The Reform of the American Administrative Process: The Contemporary Debate,* 1984 Wis. L. Rev. 385.

C. THE COURTS HAVE BEEN CORRECT TO SUSTAIN THE GAO'S CONSTITUTIONALITY

1. Correct Decisions Sustain the *GAO*

As noted, this Court stated that "[t]he GAO is an independent agency within the legislative branch," *Bowsher v. Merck & Co.*, 460 U.S. at 844. In accordance with that view, all three courts to address the question prior to this case have ruled unanimously that GAO could constitutionally perform its traditional functions pursuant to the rule for independent agencies of *Humphrey's Executor.*

As Judge Holtzoff expounded in *United States ex rel. Brookfield Construction Co. v. Stewart,* 234 F. Supp. 94, 99 (D.D.C.), *aff'd,* 339 F.2d 753 (D.C. Cir. 1964), "[u]nlike the heads of most departments and establishments of the Government, [the Comptroller General] occupies a dual position and performs a two-fold function." One function is quasi-legislative: making "investigations of matters relating to the receipt, disbursement and application of public funds, and report[ing] the results of his scrutiny to the Congress," *Id.* at 99. The other was the historic comptroller function, often labeled quasi-judicial as discussed above: "approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. § 71." *Id.* This Court has repeatedly passed approvingly on the Comptroller General's performance of this latter function. *S & E Contractors, Inc. v. United States,* 406 U.S. 1 (1972); *United States ex rel. Skinner & Eddy Corp. v. McCarl.*

Judge Holtzoff concluded that "[t]he dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties." *Stewart,* 234 F. Supp. at 99, (citing *Humphrey's Executor).* The two courts that recently upheld the GAO both embraced the "dual nature" analysis, adding their own observations

about the GAO's independence.[52] As Judge Levanthal stated, "[t]he American Constitution accommodates hybrids that work. *E.g.*, the Comptroller General . . . ." *Clark v. Valeo,* 559 F. 2d 642, 664 n.13 (D.C. Cir.) (concurring opinion), *aff'd sub nom. Clark v. Kimmitt,* 431 U.S. 950 (1977).

2. The Provision for Removal by Public Law Cannot Impair GAO's Independence

The contention common to the Executive Branch's challenge in all three cases—*Lear Siegler, Ameron,* and this one—is that the GAO cannot be independent because the Houses of Congress assertedly control it. That contention is without merit, for two reasons. First, a consideration of the Comptroller General in all his aspects, including the removal provision, shows the absence of Congressional control. Second, the removal provision is severable.

a. The Absence of Congressional Control

A number of factors show the absence of Congressional control. At the outset, the Comptroller General is not chosen by Congress. He is chosen by the President, subject to Senate confirmation, like Cabinet members, FTC Commissioners, and federal judges (none of whom, of course, is said to be subject to the control of Congress). *See Buckley v. Valeo,* 424 U.S. at 128 n.165 ("The Comptroller General is appointed by the President in conformity with the Appointments Clause)." The current Comptroller General was appointed by President Reagan in 1981 to serve a fifteen-year term.

Moreover, the courts have consistently found that Congressional influence is completely excluded in the Comp-

[52] "As already shown, the Comptroller General performs legislative, executive and judicial type functions. It is quite clear that the Comptroller General is the head of an independent administrative agency." *Lear Siegler,* slip op. at 7. The Court "f[ound] that the facts do not bear out [the Executive's] attempt to l [illegible]bel the Comptroller General a legislative officer and call his stay [illegible]unction a 'legislative veto.'" *Ameron,* 607 F. Supp. at 973.

troller General's performance of functions such as those required by this Act. "Throughout their brief, the Government characterizes the Comptroller General as a legislative officer who is controlled by the legislative branch. This Court disagrees with that characterization. . . . Congress exercises no influence over the Comptroller General . . . ." *Lear Siegler,* slip op. at 2–3, 11. "[T]he Comptroller General . . . . renders his decisions on bid protests, for example, without interference from the executive or legislative branches." *Id.* at 10–11. "Congress has no involvement whatsoever in the procurement process. Congressional influence is completely excluded from the bid protest process, unlike the legislative veto procedure struck down in *Chadha.*" *Ameron,* 607 F. Supp. at 973. In this case, the Comptroller General submitted to the district court a thorough affidavit describing how he performed his function which amply demonstrated the absence of Congressional influence. J.A. 21.

The district court received no evidence to the contrary, and made no findings to the contrary. It relied solely upon the Executive Branch's argument about the provision for removal of the Comptroller General by a public law. This sixty-five year old provision, never construed or applied, sheds little light on the 1985 Deficit Control Act, and the constitutional issues regarding it will be presented for decision only in a concrete case where a removal occurs. No such removal has occurred. The challengers have strained to reach removal issues in this case, notwithstanding the absence of any specific removal such as the ones underlying *Myers, Wiener,* and *Humphrey's Executor* and notwithstanding the absence of a single word about the GAO removal provision during the legislative consideration of the challenged Act.

The challengers' arguments consist of nothing more than abstract theory and hypotheses. To accept such strained speculation as the basis for this Court to address constitutional issues would allocate to this and other Courts the function of roaming through the code-books

for tangential matters to decide whenever any government agency with an interesting charter is involved; it would "convert the Judiciary into an open forum for the resolution of political or ideological disputes about the performance of government." *United States v. Richardson,* 418 U.S. 166, 192 (1974) (Powell, J., concurring). The House parties join with the Senate's fuller remonstrance against this.

If this Court does, nevertheless, decide to address the 1921 removal provision, the Court should recognize that the provision supports rather than impairs the independence of the Comptroller General. It will be recalled that the President vetoed an early version of the 1921 Act, expressing in his veto message, as his primary concern, *see* 59 Cong. Rec. 8609 (1920) (veto message), his desire for the power to remove the Comptroller at will; *Humphrey's Executor* resolved that issue. The President's secondary concern was the bill's provision for removal by concurrent resolution. *Id.* Congress responded with a provision that removal would occur only after a hearing on specific charges of misconduct, and then only by public law presented to the President. 31 U.S.C. § 703(e)(1)(B)(1982), J.A. 102. As the changes made evidently resolved the concerns of the Presidency, the President signed the 1921 bill without objection.

The President had sound reason to sign that latter version. The removal provision signifies the Congressional intent to protect the Comptroller's independence against encroachment. A Comptroller General can, and should, reliably distinguish his situation from that of officers removable by the President or by resolution of one (or both) Houses. To remove him before the end of his fifteen-year term would require the full application of the legal power of the President and the Congress through enactment of a public law—a far higher measure of protection than other officers have. For the reasons discussed above, Congress could validly provide this added safeguard that removal occur only for cause, and by a public law. Of

course, such a law, because it is presented to the President, fully complies with this Court's doctrine in *Chadha*.[53] Moreover, as an additional safeguard, this Court's doctrines provide that public laws removing individual federal officers have to meet very difficult constitutional standards. *United States v. Lovett*, 328 U.S. 303 (1946). After *Lovett*, the Comptroller General is very secure and independent indeed.

Although plaintiffs and the Executive Branch challenge this Act on its face, as unconstitutional in all circumstances, they rest their challenge on the most extreme of speculations. They contend that after sixty-five years of the provision's disuse, the Comptroller General will become subservient, not merely from a view that Congress might join with the President in a public law removing him for cause, but that Congress would pass an effective law *alone* through an override of a Presidential veto. Obviously, were the Comptroller General even to speculate about that possibility, he would be aware of the constitutional impediments and considerations discussed herein, such as *Lovett*, where Presidential opposition led to the invalidation of a public law terminating the salaries of three federal officers. On the other hand, he will also be aware that a public law has an entirely different status under the Constitution from the mere action of one or both Houses alone.

More fundamentally, however, there has to be a limit to insecurities about removal. It does not appear that a single word of concern about the possibility of passage of

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[53] It is quite clear, for example, that *Myers* had a situation akin to a legislative veto in mind, when it speaks of Congress "draw[ing] to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power," 272 U.S. at 161. *Myers'* dictum talks, of course, about the status of one or both Houses involved in the *Myers* case itself—there, involvement by the Senate alone—rather than the entirely different status of the two Houses and the President in enacting public laws. *See Chadha* (sharply distinguishing the status of one or both Houses acting alone, from their participation in enacting public laws).

a public law by override to remove the Comptroller General was expressed either in 1921 or 1985, and rightly so. The House parties reject the suggestion that this Court should invalidate a major Act of Congress on its face, based on the argument that the Comptroller General lives in subservience because of extremely remote and speculative hypotheticals. There is simply no comparison between the Comptroller's historic independence and the examples of actual Congressional control presented in *Chadha* by the legislative veto and in *Buckley* by the Congressional appointments.[54]

For Appointments Clause purposes, it was agreed by the manager of the 1921 bill, by the President in his veto message, and by the leading contemporaneous commentator, that the Comptroller General could be appointed as an "inferior officer."[55] This Court has held that Congress possesses broad powers to shape the removability provisions for such officers. In *United States v. Perkins*, 116 U.S. 483 (1886) the Court utterly rejected the argument that a removability provision for such officers was "an infringement upon the constitutional prerogative of the Executive," holding instead that the Congress "may limit and restrict the power of removal as it deems best." *Id.* at 485 (quotation omitted).[56]

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[54] The availability of such arguments about asserted control through enactment of public laws has not precluded the rule that "neither the tenure nor salary of [any] federal officers is constitutionally protected from impairment by [public law]," *Glidden Co. v. Zdanok*, 370 U.S. 530, 534 (1962). "[I]n every perfect or competent government, there must exist a general power to enact and to repeal laws; and to create, and change or discontinue, the agents designated for the execution of those laws." *Butler v. Pennsylvania*, 51 U.S. (10 How.) 402, 416 (1850). *See* Comment, 42 Fordham L. Rev. 562, 585-94 (1974) (collecting cases).

[55] 59 Cong. Rec. 8609 (1920) (veto message). The bill manager agreed, 61 Cong. Rec. 982, 1856 (1921) (Rep. Good) ("inferior officer"), as did the leading contemporaneous commentator, Powell, *The President's Veto of the Budget Bill*, 9 Nat'l. Mun. Rev. 538, 539 (1920).

[56] Even the district court so recognized, J.A. 61-62 n.23 (citing *Perkins*).

This is not to argue for such provisions for inferior officers generally. The House parties need not make any such claims, nor need this Court address such a matter, any more than have any of the courts sustaining the GAO. Rather, the provision at issue concerns the single officer with the pivotal function pursuant to the constitutional provision that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law," U.S. Const., art. I, sec. 9, cl. 7, J.A. 91.

As described above, a powerful constitutional history of British, state, and federal precedents documents the Framers' intent in that Clause, namely that the power of the purse necessarily implied an independent Comptroller to check the Executive. The clause brought forward the experience of colonial legislatures and the House of Commons: that the Executive—be he monarch or President—must not be able to command spending where there has been no appropriation, and so must not control the Comptroller who passes upon such expenditures. Otherwise, the power of the purse, as the people's check on foreign adventures and domestic machinations of the Executive, would be gravely imperilled. The Appropriations Clause draws on three centuries of experience, including unmistakably clear precedents during the 1780s directly on the eve of the Constitutional Convention. See pages 25-33 *supra*. This Court has established that this extraordinary Clause draws special interpretive meaning from historic practice, *Cincinnati Soap Co. v. United States,* 301 U.S. 308, 316-17 (1937), and that it involves particularly strong Congressional prerogatives in separation of powers disputes regarding asserted powers of the other Branches.[57]

Above all, the glaring weakness in the Executive's separation of powers challenge is its inability to quote any specific constitutional prohibitions. This is not a case like

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[57] *See Hart v. United States,* 118 U.S. 62, 66-67 (1886) (Appropriations Clause not overridden by Executive pardon power); *Reeside v. Walker,* 52 U.S. (11 How.) 271 (1851) (Appropriations Clause not overridden by judicial writ).

Chadha or *Buckley,* where the Executive points to a specific clause, and offers some express language for this Court to apply. The Executive cannot point to any express language because there is none. The Executive cannot prove that an independent Comptroller does violence to the original intent of the Framers, particularly considering the words of James Madison himself on the subject. Rather, the Executive urges attenuated separation of powers implications patched together from a motley collection of sources. Not a single one of the hundreds of Members who voted either for or against the Act, nor the Executive itself, ever challenged the GAO role during the legislative consideration, leaving uncontested the conclusion of bipartisan proponents that GAO would "wall" off the Congress.

In essence, the Executive seeks for this Court to implement the Executive's preferences by reading the rigid "archaic" view of the separation of powers into the Constitution. This Court has rejected that archaic view repeatedly. See pages 14–17 *supra.* Where, as here, the Constitution imposes no specific prohibition, this Court should leave to the political processes their responsibility for the vast and difficult enterprise of budgeting and governing.

b. Severability

If the removal provision impaired the Comptroller's independence—or if the President had to have inherent power to remove the Comptroller for cause—then the removal provision would be severed. This conclusion results whether the matter is viewed from the perspective of the current Congress which enacted the Deficit Control Act, or from that of the Congress which enacted the 1921 budget reform Act.[58]

In any event, the sounder analysis was that of the court in *Lear Siegler,* slip op. at 5–6, when it stated that "[t]he statutory provisions dealing with the removal of

[58] The House parties join in the fuller treatment of the Senate and the Comptroller General on these issues.

the Comptroller General also cut against the Government's claim that the office is controlled by Congress . . . . [A]s the legislation itself demonstrates, the Comptroller General is an officer independent of both the executive and legislative branches." No other officer (outside the Article III judiciary) has the security provided by the requirement for the Comptroller's removal, not merely of an action of the President alone or one or both Houses of Congress alone but of a public law passed by the President and Congress based on specific charges of misconduct. Three centuries of Anglo-American history have shown the necessity for an independent Comptroller, and this Court's doctrines have upheld Congress' authority to safeguard that function.

CONCLUSION

No constitutional provision supports the facial challenge to this Act. In its intent to "wall" off the function at issue from Congress and the President, the Act draws strength from a uniquely powerful constitutional history of an independent Comptroller. This Court should allow the political Branches to work their will with the intractable national problem of the deficit. The Act should be upheld.

Respectfully submitted,

STEVEN R. ROSS,
General Counsel to the Clerk.

CHARLES TIEFER,
Deputy General Counsel to the Clerk.

MICHAEL L. MURRAY,
JANINA JARUZELSKI,
Assistant Counsels to the Clerk.

Counsel for the Speaker and Bipartisan Leadership Group.

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FOR ARGUMENT

Nos. 85-1377, 85-1378 and 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

CAROLYN B. KUHL
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT E. KOPP
NEIL H. KOSLOWE
DOUGLAS LETTER
HAROLD J. KRENT
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the assignment of executive functions under Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 to the Comptroller General, an officer of the Legislative Branch who is subject to removal by Congress, but not by the President, violates the constitutionally mandated separation of powers.

PARTIES TO THE PROCEEDING

Plaintiffs in Civil Action No. 85-3945 were Representatives Mike Synar, Gary L. Ackerman, Albert G. Bustamante, Silvio O. Conte, Don Edwards, Vic Fazio, Robert Garcia, John J. LaFalce, Jim Moody, Claude D. Pepper, Robert G. Torricelli, and James A. Traficant. Plaintiff in Civil Action No. 85-4106 was the National Treasury Employees Union. On March 31, 1986, this Court granted a motion to add a member of the Union, Van Riddel, as a plaintiff in the Union's action. The United States was the defendant in both actions. The Comptroller General of the United States, the United States Senate, and the Speaker and Bipartisan Leadership Group of the House of Representatives, composed of Thomas P. O'Neill, Jr., Jim Wright, Robert Michel, Thomas Foley, and Trent Lott, intervened as defendants in both actions in the district court.

The district court intervenors are appellants in this Court. Plaintiffs and the United States are appellees.

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v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

No. 85-1378

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

No. 85-1379

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (J.A. 27-80) is reported at 626 F. Supp. 1374.

JURISDICTION

The order of the district court (J.A. 81-82) was entered on February 7, 1986. The notices of appeal in Nos. 85-1377 and 85-1378 were filed on February 7, 1986, and the notice of appeal in No. 85-1379 was filed on February 10, 1986. The jurisdictional statements were filed on

February 18, 1986, and the Court noted probable jurisdiction on February 24, 1986. The jurisdiction of this Court is invoked under Section 274(b) of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1098 (J.A. 163-164), and 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Constitution; the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 *et seq.*; 31 U.S.C. 702 and 703; and the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, Tit. II, 99 Stat. 1038 *et seq.*, are set forth at J.A. 91-167.

STATEMENT

1. Congress enacted the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, Tit. II, 99 Stat. 1038 *et seq.*, in December 1985. The Act is intended to achieve a balanced federal budget by 1991 through the establishment of progressively lower deficit targets for the next six fiscal years. § 201(a)(1) (J.A. 104). The Act provides that the Comptroller General will issue a report to the President and Congress each fiscal year that contains an estimate of the size of the deficit and specify the budget cuts, if any, that are necessary in each federal spending account to meet the applicable deficit target. § 251(b) (J.A. 116-118). The President then is required to sequester federal funds in accordance with the Comptroller General's report. § 252 (J.A. 124-134).

The Comptroller General is the head of the General Accounting Office (GAO), "an instrumentality of the United States Government independent of the executive departments" (31 U.S.C. 702(a) and (b)). The Comptroller General is appointed for a 15-year term by the President, with the advice and consent of the Senate (31 U.S.C. 703(a)(1) and (b)), but he is subject to removal by joint resolution of Congress (31 U.S.C. 203(e)(1)(B)). At issue in this litigation is the constitutionality of the Comptroller General's authority to specify the

spending reductions that must be effected by the President to reach the deficit targets established under the Act.

a. The deficit reduction process established by the Act requires the Director of the Office of Management and Budget (OMB) and the Director of the Congressional Budget Office (CBO) to prepare a joint report for the Comptroller General estimating the size of the federal deficit on the basis of their projections of government revenues and outlays and economic growth for the next fiscal year.[1] For items in the report on which OMB and CBO are unable to agree, "they shall average their differences" and "shall also indicate the amount [each of them] initially proposed." § 251(a)(5) (J.A. 115). If they predict that the deficit will exceed the Act's target for that year by more than a specified amount, the Directors of OMB and CBO must identify the reductions in each budget account that are necessary to eliminate the excess of the projected deficit over the statutory ceiling. Subject to certain exceptions, one-half of the deficit excess must be eliminated by proportionately reducing outlays in defense programs and the other half by proportionately reducing outlays in nondefense programs. § 251(a) (J.A. 109-116).

After he receives the OMB-CBO report, the Comptroller General is required to issue a report to the President and Congress setting forth his own determinations for each of the items contained in the OMB-CBO report. § 251(b) (J.A. 116-118). The Act requires the Comptroller General to undertake an "independent analysis" (S. Rep. 99-433, 99th Cong., 1st Sess. 84 (1985)), giving "due regard for the data, assumptions, and methodologies used [by

[1] OMB is "an office in the Executive Office of the President" (31 U.S.C. 501), and the Director of OMB is appointed by the President, with the advice and consent of the Senate (31 U.S.C. 502(a)(1)). CBO is "an office of the Congress" (2 U.S.C. 601(a)). The Director of CBO is appointed for a four-year term by the Speaker of the House of Representatives and the President pro tempore of the Senate, although he may be removed at any time by a resolution passed by either House (2 U.S.C. 601(a)(4)).

OMB and CBO]" and basing his report on their "estimates, determinations, and specifications." § 251(b)(1) and (2) (J.A. 116, 117). The Comptroller General must "explain fully any differences between the contents of [his] report and the report of [OMB and CBO]." § 251(b)(2) (J.A. 118).

In any year in which the Comptroller General predicts that the deficit will exceed the target by more than $10 billion (or by more than $0 in fiscal years 1986 and 1991), the President "shall [issue an order] eliminat[ing] the full amount of the deficit excess" as determined by the Comptroller General. § 252(a)(1) (J.A. 124). To accomplish that purpose, the President's order must sequester all forms of federal budget resources "in accordance with" the Comptroller General's report and must modify or suspend certain automatic spending increases. § 252(a)(1)(A) and (B) (J.A. 124-125). The President's order "must be consistent with" the Comptroller General's report "in all respects," and he "may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages." § 252(a)(3) (J.A. 128).[2] Except with respect to fiscal year 1986, the President's initial sequestration order becomes effective as of October 1 (the beginning of the fiscal year), and on that date all sequestered funds "shall be withheld from obligation" pending a final order. § 252(a)(4) and (6) (J.A. 128, 129). Following submission of revised reports by the Directors of OMB and CBO and then by the Comptroller General, the President must issue a final sequestration order by October 15 that implements the reductions specified in the Comptroller General's revised report. §§ 251(c), 252(b) (J.A. 118-119, 132-134). The Comptroller General must submit a report to Congress and the President by November 15 of

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[2] Subject to the Comptroller General's approval, the President may terminate or modify existing defense contracts and credit the net savings against the amount of defense budget authority that he would otherwise be required to sequester. § 251(d)(3) (J.A. 121-123).

each fiscal year "on the extent to which the President's order" complies with the Act. § 253 (J.A. 134).

The Act also provides a special fallback mechanism to take effect automatically "[i]n the event that any of the [OMB-CBO and Comptroller General] reporting procedures * * * are invalidated." § 274(f)(1) (J.A. 165). Under this mechanism, the OMB-CBO report is to be transmitted to a joint congressional committee, which is directed to report within five days a joint resolution setting forth the contents of the OMB-CBO report. § 274 (f)(2) and (3) (J.A. 165-166). Floor debate on the joint resolution is limited to two hours. § 274(f)(4) (J.A. 166). Upon enactment of the joint resolution (which requires presentment to the President), the resolution is "deemed to be the report received by the President [from the Comptroller General]." § 274(f)(5) (J.A. 166).

b. The Act further includes special provisions for fiscal year 1986, which already had commenced when the statute was enacted.[3] Pursuant to these provisions, OMB and CBO submitted their joint report to the Comptroller General on January 15, 1986, and the Comptroller General issued his report to the President and Congress six days later. § 251(a)(2) and (b)(1) (J.A. 109, 117). On February 1, 1986, the President issued an order making the required reductions, which totalled $11.7 billion. The President's sequestration order became effective on March 1, 1986. § 252(a)(6)(A) and (D) (J.A. 129, 131).

2. These consolidated actions were filed in the United States District Court for the District of Columbia in December 1985, seeking a declaratory judgment that the Act is unconstitutional. One action was filed by Representative Mike Synar, who was later joined by eleven other Members of the House of Representatives. J.A.

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[3] See, *e.g.*, § 252(a)(6)(C)(i) (J.A. 129-130) (automatically suspending cost-of-living increases as of date of enactment through issuance of first sequestration order); § 252(a)(2)(C) (J.A. 127) (providing the President with limited flexibility in allocating defense reductions among programs, projects, and activities).

9-12. The other action was filed by the National Treasury Employees Union (J.A. 13-15).[4] The United States informed the House and Senate of its position that the role of the Comptroller General under the Act is unconstitutional, and the Comptroller General, the Senate, and the Speaker and Bipartisan Leadership Group of the House intervened as defendants in both actions to support the constitutionality of the Act (J.A. 30-32). A three-judge court was convened, as required by Section 274(a)(5) of the Act (J.A. 163). See J.A. 29 n.1.

The district court held that the Act is unconstitutional because "the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress" (J.A. 78).[5] The court observed that although the Comptroller may function as an aid to Congress in other respects, his "powers under the automatic deficit reduction process * * * do not come within that category" (J.A. 72).[6] Rather, his duties under the Act require "interpretation of the law" and "the exercise of substantial judgment concerning present and future facts that

[4] By order dated March 31, 1986, this Court granted the Union's motion, to which all other parties consented, to add an individual member of the Union, Van Riddel, as a plaintiff.

[5] The district court first concluded that the Union has standing to represent its members, who include retirees whose cost-of-living allowances were suspended under the Act and cancelled under the sequestration order, and that the Members of Congress have standing under binding circuit precedent to assert that the Act interferes with their lawmaking powers (J.A. 32-38). The court then concluded that the Constitution permits Congress to delegate to administrative officials the power to make the economic calculations that determine the estimated federal deficit and the required budget cuts (J.A. 38-55).

[6] The court reasoned that this objection was ripe for adjudication even though no attempt has been made to remove the Comptroller General, because "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation-of-powers problems" (J.A. 57 (footnote omitted)).

affect the application of the law," both of which are "power[s] normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed'" (J.A. 72, 73 (quoting Art. II, § 3)). Most critically, in the court's view, "both of these specifications by the Comptroller General are, by the present law, made binding upon the President in the latter's application of the law" (J.A. 73 (emphasis omitted)). Because "congressional removal power cannot be approved with regard to an officer who actually participates in the execution of the laws," the court concluded that the Comptroller General's role under the Act violates the constitutional doctrine of separation of powers (J.A. 75).[7]

Accordingly, the court issued an order declaring the Act unconstitutional in this respect and invalidating the sequestration order issued on February 1, 1986 (J.A. 81-82). Pursuant to Section 274(e) of the Act (J.A. 165), the court stayed the effect of its order pending appeal to this Court (J.A. 82).

SUMMARY OF ARGUMENT

I. The central principle of the Constitution of the United States is the separation of the powers of the Federal Government among its three Branches. One aspect of the separation of powers under the Constitution concerns the appointment and removal of the "Officers of the United States" who are charged with administering the laws enacted by Congress. The Constitution provides that the President shall nominate and, with the advice and consent of the Senate, shall appoint the principal officers of the Government. Art. II, § 2, Cl. 2. The authority of the President to remove officers charged with administering the laws has long been regarded as

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[7] The court also concluded that, especially in light of the fallback mechanism provided in the Act in the event of invalidation of the reporting procedures (see page 5, *supra*), Congress intended that "the Comptroller General's powers under this Act, rather than his manner of removal, * * * should yield if both cannot coexist" (J.A. 60).

incidental to his power of appointment, as well as an aspect of the "executive Power" vested in the President (Art. II, § 1) that is essential to fulfillment of his obligation to "take Care that the Laws be faithfully executed" (Art. II, § 3). See *Myers* v. *United States*, 272 U.S. 52, 115-123 (1926). In *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), the Court held that Congress could bar the President from removing a member of the Federal Trade Commission except for cause, in light of what the Court termed the "quasi-legislative" and "quasi-judicial" powers of the FTC (*id.* at 628) and its status as an agency "wholly disconnected from the executive department" (*id.* at 630). *Humphrey's Executor* did not, however, question the holding of *Myers* that Congress may not itself participate (except through the impeachment process) in the removal of an officer of the United States who is charged with the administration of the laws.

II. Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 (the Act) is inconsistent with these principles of separations of powers. The Comptroller General is the central decision-maker in the administrative implementation of that Act. The President of the United States, and the executive departments and agencies that are otherwise subject to his direct control, are subordinated to the Comptroller General. This arrangement suffers from two fundamental defects. Each derives from the nature of the office of the Comptroller General, who, though appointed by the President with the advice and consent of the Senate for a term of 15 years, may be removed during this period not only by impeachment, but also by joint resolution of Congress. 31 U.S.C. 703(a)(1), (b) and (e)(1).

The first defect in the assignment to the Comptroller General of substantive responsibilities in the budget reduction process prescribed by Section 251 of the Act is that, by statute, the Comptroller General is subject to removal by Congress. Under *Myers*, neither Congress nor either of its Houses may participate in the removal of

an Officer of the United States who is engaged in the administration and execution of the law. This is not a technical rule of protocol. It is a fundamental aspect of the doctrine of separation of powers. For as the district court held, once an officer is appointed, the designation of the authority to remove him is the clearest indication of the authority to which he is accountable. Section 251 therefore results in a prohibited influence by Congress over an officer who is charged with implementing an Act of Congress.

The violation of the separation of powers occasioned by such an arrangement is particularly acute in this case, because the provision for congressional removal of the Comptroller General, while constitutionally defective in its own right, also is but one aspect of a far more pervasive nexus between the Comptroller General and Congress. The Comptroller General is an officer of the Legislative Branch whose principal duty is to "serve the needs of Congress" (*Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983)), particularly by assisting in investigations of the expenditure of public funds and other operations of the Executive Branch. Consistent with this charter, the Comptroller General has regarded himself—and he uniformly has been regarded by all three Branches of Government—as an officer of the Legislative Branch. Such an officer cannot be vested with authority to render administrative determinations that bind the President and those under his superintendence in the Executive Branch.

III. The second fundamental constitutional defect results from the fact that the Comptroller General does not serve at the pleasure of the President. This Court held in *Humphrey's Executor* that Congress could limit the President's power to remove a member of a commission that performed what the Court described as "quasi-judicial" functions and rendered investigatory assistance to Congress with respect to a discrete subject matter, while remaining "wholly disconnected from the executive department" (295 U.S. at 630). In this case,

however, the Comptroller General's functions under Section 251 of the Act are not quasi-judicial: he does not find historical facts pertaining to a particular person or transaction and render a decision regarding the legal consequences of past conduct. Rather, the Comptroller General is charged with making broad predictions regarding the future performance of the economy and the impact of that performance on federal receipts and expenditures and the budget deficit. Nor does he merely investigate these matters and render advice to Congress; the Comptroller General's projections, as well as his calculation of the necessary budget reductions, are binding upon the President and, through him, the heads of the executive departments and agencies.

Nothing in *Humphrey's Executor* can be stretched so far as to permit Congress to vest an officer who does not serve at the pleasure of the President with the power to intrude upon and effectively direct the execution of the laws by the President and his subordinates within the wide range of *their* responsibilities. The Framers deliberately settled upon a unitary Executive in order to promote a sense of personal responsibility and accountability to the people in the execution of the laws—and thereby to ensure vigorous administration of the laws and protection of the liberty, property, and welfare of the people. *The Federalist No. 70* (A. Hamilton) (C. Rossiter ed. 1961) [hereinafter cited as *The Federalist*]. A division between the President and the Comptroller General of authority over the administration of the laws throughout the Executive Branch cannot be reconciled with this considered judgment by the Framers. Of course, Congress, by enacting a *law*, could itself prescribe the precise spending reductions that must be implemented by the President and subordinate officials in the Executive Branch. That is the course contemplated under the "fallback" mechanism in Section 274(f) of the Act, which will be triggered if this Court affirms the district court's invalidation of Section 251 because of the role of the Comptroller General. See page 5, *supra*, and pages

57-58, *infra.* In that event, the elected representatives of the people in the Legislative Branch would be directly accountable to the people for the spending reductions that result. But if Congress chooses instead to enact a law that provides for administrative calculation of the precise spending cuts required throughout the Executive Branch, the execution of that law is the responsibility of the President, who is the people's elected representative in the Executive Branch.[8]

IV. Section 251 is not saved from unconstitutionality on the ground that Congress has not actually sought to remove the Comptroller General from office. Far more is at stake than a personal right of the incumbent to remain in office. Under the doctrine of separation of powers, in order to preserve the integrity of our system of government, the Comptroller General is disqualified from performing the duties assigned to him under Section 251 because the provision for congressional removal and his status as an officer of the Legislative Branch affect the nature of his office, and because those duties must in any event be performed by a person who serves at the pleasure of the President. That issue of disqualification is directly implicated here and should be resolved.

Section 251 also cannot be saved from unconstitutionality simply by "severing" the statutory provision for congressional removal of the Comptroller General from office. That action would not eliminate the constitutional defects in Section 251 because it would not undo Congress's repeated designation of the Comptroller General as an officer of the Legislative Branch, nor, presumably, would such severance make him subject to removal by the President at will. Moreover, Congress specified the alternative procedures to be followed "[i]n the event

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[8] We agree with the district court that Congress's assignment to administrative officials of the authority to make the economic calculations that determine the estimated federal deficit and the required budget cuts does not constitute an unconstitutional delegation by Congress of the "legislative Powers" vested in it by Article I, Section 1, of the Constitution. See J.A. 38-55.

that any of the reporting procedures described in Section 251 are invalidated" (§ 274(f)), and that specification is binding on the courts. Congress did not, sub silentio, authorize the courts instead to fundamentally alter the nature of the office of the Comptroller General as it has existed for 65 years.[9]

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[9] On March 31, 1986, this Court granted the Union's unopposed motion to add an individual member of the Union, Van Riddel, as a plaintiff. Riddel, a retired federal employee, plainly has standing under Article III and Section 274(a)(2) of the Act (J.A. 163) to challenge the constitutionality of Section 251 of the Act because the President's sequestration order permanently cancelled a cost-of-living increase that had been scheduled to go into effect January 1, 1986. See J.A. 35-36 & n.5, 83-86; § 252(a)(6)(C) (J.A. 129-130). For the reasons stated in our brief in *International Union, UAW* v. *Brock*, No. 84-1777 (argued Mar. 25, 1986), and in our petition for a writ of certiorari in *Burke* v. *Barnes*, cert. granted, No. 85-781 (Mar. 3, 1986) (copies of which we are providing to counsel), we do not believe that either the Union or the individual Members of Congress, who filed complaints as plaintiffs in the district court, have standing. (With respect to the standing of an individual Member of Congress to challenge a law duly enacted by Congress, see also *Bender* v. *Williamsport Area School District*, No. 84-773 (Mar. 25, 1986), slip op. 9-10 & n.7.) There is, however, no need for the Court to address the standing of these parties in light of Riddel's standing to bring this action. See, *e.g.*, *Secretary of the Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *Carey* v. *Population Services International*, 431 U.S. 678, 682 (1977); *Buckley* v. *Valeo*, 424 U.S. 1, 12 (1976). In our view, questions of representational and congressional standing would best be addressed in *Brock* and *Barnes*, rather than in this case, where they are not essential to a resolution of the merits.

The district court believed that, despite the consolidation of the two suits that originally were filed, it was necessary to consider the standing of the plaintiffs in each of those suits (J.A. 32-38). However, such an inquiry is not required by this Court simply because separate actions were originally filed below. *Secretary of the Interior* v. *California*, 464 U.S. at 319 n.3. See also *Norton* v. *Mathews*, 427 U.S. 524 (1976).

ARGUMENT

SEPARATION OF POWERS UNDER THE CONSTITUTION BARS THE COMPTROLLER GENERAL FROM PERFORMING THE EXECUTIVE FUNCTIONS ASSIGNED TO HIM BY SECTION 251 OF THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985

Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 vests the Comptroller General with power to execute critical aspects of the Act by making economic and fiscal projections and deficit reduction calculations that are binding on the President and the entire Executive Branch. The constitutional doctrine of separation of powers bars the Comptroller General from participating in the execution of the Act: *first*, because the Comptroller General is subject to removal by Congress and indeed is an officer of the Legislative Branch; and *second*, because the performance of these functions in a manner that binds the President and the heads of the executive departments and agencies under his control can be undertaken only by the President or by an Officer of the United States who serves at the pleasure of the President. Before elaborating upon these defects, we first discuss the constitutional principles of separation of powers that govern this case.

I. THE PRESIDENT'S POWERS OF APPOINTMENT AND REMOVAL ARE INTEGRAL ASPECTS OF THE SEPARATION OF POWERS

A. The Doctrine Of Separation Of Powers

The Constitution divides the powers of the Federal Government among its three Branches as part of a system of checks and balances. This separation of powers lies "at the heart of the Constitution" (*Buckley* v. *Valeo*, 424 U.S. 1, 119 (1976)) and is embodied in its "very structure" (*INS* v. *Chadha*, 462 U.S. 919, 946 (1983)). Thus, the Constitution declares that "All legislative powers herein granted shall be vested in a Congress of the United States" (Art. I, § 1); "The executive Power shall

be vested in a President of the United States" (Art. II, § 1); and "The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish" (Art. III, § 1). Each of these first three Articles specifies the powers of a particular Branch.

The division of responsibilities among the Branches was not a mere housekeeping measure. The Framers had a profound purpose in mind. As James Madison explained in *The Federalist No. 47*, quoting Montesquieu, "'[w]hen the legislative and executive powers are united in the same person or body, * * * there can be no liberty, because apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner'" (*id.* at 303 (emphasis in original)). In order to avoid that consequence, the separation of powers was intended to assure, as nearly as possible, that each Branch will operate only within its assigned sphere of responsibility. *Chadha*, 462 U.S. at 951. Thus, "the Constitution diffuses power the better to secure liberty" (*Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring)) and to furnish "a vital check against tyranny" (*Buckley*, 424 U.S. at 121).

At the same time, the Framers included in the Constitution certain express checks—such as the Presidential veto of legislation and its override, and Senate consent to appointments and ratifications of treaties—by which one Branch could protect against encroachment or aggrandizement by another. In this way, the power of the government as a whole was to be contained. The Court generally has understood such express constitutional provisions for the involvement by one Branch in the affairs of another to be exclusive, and it has construed the Constitution to bar such involvement where it is not affirmatively authorized. See, *e.g.*, *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127; *Myers*, 272 U.S. at 116; *Kilbourn* v. *Thompson*, 103 U.S. 168, 191 (1880). The Constitution thus was intended to be faithful to

Montesquieu's theory of distinct and separate departments of government, except where a departure from that theory was deemed necessary by the Framers as a "self-executing safeguard" (*Buckley*, 424 U.S. at 122) against possible abuse by one of those departments (*The Federalist No. 47*, at 302-303, 307-308). It is only through such specific provisions in the Constitution itself that one Branch may have a "*partial agency* in" or "*control* over" the actions of another Branch, to which Madison referred, quoting Montesquieu (*id.* at 302 (emphasis in original)).[10] This Court has "not hesitated to enforce the principle of separation of powers embodied in the Constitution" when "its application * * * prove[s] necessary for the decisions of cases or controversies properly before it" (*Buckley*, 424 U.S. at 123).

The vesting of the "executive Power" in the President and his correlative duty to "take Care that the Laws be faithfully executed" (Art. II, § 3) give expression to the Framers' conclusion that there must be a unitary, vigorous, and independent Executive who is responsible directly to the people, not to Congress (except by impeachment). To that end, the Constitution provides for the election of the President by an independent body of electors chosen by the people. Art. II, § 1, Cls. 2-3; Amend. XII. See *The Federalist No. 68*, at 411-414 (A. Hamilton); *The Federalist No. 70*, at 423-431.[11]

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[10] Indeed, the purpose of *The Federalist No. 47* was to defend against the charge that even the checks expressly provided for by the Constitution violated "the political maxim that the legislative, executive, and judiciary departments ought to be separate and distinct" (*id.* at 301). The House of Representatives therefore errs in relying (Br. 16) on the quoted language in *The Federalist No. 47* for the notion that one Branch may exert control over the affairs of another in circumstances where the Constitution does not specifically so provide.

[11] See also Art. II, § 1, Cl. 7 (President's compensation may not be increased or decreased); Art. I, § 6 (no person holding any Office under the United States shall be a Member of either House of Congress); Art. II, § 1, Cl. 2 (no Senator or Representative may be an elector).

Energy in the execution of the laws was deemed by the Framers to be "a leading character in the definition of good government" (*The Federalist No. 70*, at 423). The attributes deemed necessary for energy in the Executive were "unity; duration; an adequate provision for its support; and competent powers" (*id.* at 424). The first of these—unity, with "power in a single hand"—was regarded as particularly essential for there to be decisiveness, activity, and dispatch in carrying into effect the measures that the "numerous legislature" had adopted following debate, circumspection, and compromise (*id.* at 424, 427). In Hamilton's view, "[t]his unity may be destroyed * * * by vesting it ostensibly in one man, subject in whole or in part to the control and cooperation of others, in the capacity of counselors to him" (*id.* at 424).[12] Dissension among several responsible officials would "lessen the respectability" and "weaken the authority" of the Executive (*id.* at 426) and embarrass and delay the implementation of measures adopted by Congress (*id.* at 427).[13]

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[12] The Constitutional Convention rejected several plans that would have undermined the unity of the Executive. The first was Edmund Randolph's proposal that the Executive consist of three members drawn from separate geographical regions (1 M. Farrand, *The Records of the Federal Convention, 1787*, at 66, 71-74, 88, 91-92, 97 (rev. ed. 1966) [hereinafter cited as Farrand]). James Wilson successfully opposed that proposal on the ground that it would lead to "nothing but uncontrolled, continued, and violent animosities; which would not only interrupt the public administration, but diffuse their poison through the other branches of government, through the states, and at length through the people at large" (*id.* at 96). The Convention also rejected the proposal for the President to have a Privy Council or similar body, consisting either of the Chief Justice and the heads of executive departments (2 Farrand 335-337) or representatives of regions (*id.* at 533, 537, 542). Finally, the Framers rejected proposals for participation by judges or others in the exercise of the veto power (1 Farrand 97-98; 2 Farrand 73-80).

[13] The unity of the Executive under the direction of the President is reflected not only in the Take Care Clause, but also in the President's status as "Commander in Chief of the Army and Navy"

In addition, the Framers believed that an absence of unity in the Executive would create an absence of responsibility and accountability, and thereby "deprive the people of the two greatest securities they can have for the faithful exercise of any delegated power": "the restraints of public opinion" and "the opportunity of discovering with facility and clearness the misconduct of the persons they trust" (*The Federalist No. 70*, at 428-429). See generally 1 Farrand, *supra* note 12, at 65-67, 71-74, 96-97, 109, 254, 266-267.

Of course it is quite irrelevant to the crucial importance of maintaining the integrity of these foundational principles that in a particular instance where the principles are ignored no immediate threat to individual liberty, or even to governmental responsibility, impends. What protects these values, and offers constant reassurance to the people of that protection, is the structure of the Constitution itself; and what threatens these values and the security of the people is any disposition to dilapidate that structure. The Framers concerned themselves with potential abuses of power and sought to structure a system that would prevent or contain them in their incipiency.

B. The Power Of Appointment

Consistent with their intention regarding the stature and authority of the President, the Framers recognized that the President's power and duty to execute the laws must carry with it the right to choose the subordinate officers of government who will assist him in that task. As this Court has held (*Buckley*, 424 U.S. at 135-136 (quoting *Myers*, 272 U.S. at 117)):

(Art. II, § 2, Cl. 1); his power to "require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices" (*ibid.*); and his prerogative to "receive Ambassadors and other public Ministers" (Art. II, § 3), which is an aspect of the "'plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.'" *Dames & Moore* v. *Reagan*, 453 U.S. 654, 661 (1981) (quoting *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

> The vesting of the executive power in the President was essentially a grant of the power to execute the laws. But the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates. * * * As he is charged specifically to take care that they be faithfully executed, the reasonable implication, even in the absence of express words, was that as part of his executive power he should select those who were to act for him under his direction in the execution of the laws.

The Framers did not, however, leave that matter to implication. Article II, Section 2 provides that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States * * * which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

The Framers' decision to vest the power of nomination and appointment in the President was consistent with their conception of a strong, unitary, and responsible Chief Executive. A number of delegates to the Convention expressed the fear that individual members of a numerous legislative body would not have the requisite sense of personal responsibility for the selection of officers and might be prone to cabal, parochial biases, and considerations of personal regard. By contrast, the President was expected to be more capable of selecting a suitable person and to be held accountable by the people for his selection. As James Wilson explained: "Good laws are of no effect without a good Executive; and there can be no good Executive without a responsible appointment of officers to execute" (2 Farrand 538-539). See generally *id.* at 41-44, 80-83, 314-315, 339.

The President's power to appoint officers of the United States of course was explicitly made subject to the ad-

vice and consent of the Senate. Madison referred to this provision as a check against "any incautious or corrupt nomination by the Executive" (1 Farrand 43) and a protection for the interests of the smaller States (*id.* at 80-81; *Myers*, 272 U.S. at 119-120). See generally *The Federalist No. 76*. But as Hamilton stressed (*The Federalist No. 66*, at 405 (emphasis in original)):

> There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the Executive, and oblige him to make another; but they cannot themselves *choose*—they can only ratify or reject the choice of the President.

The persons appointed to office as the heads of the departments were intended to be the agents of the President in the execution of the laws. *The Federalist No. 72*, at 435-436. See *In re Neagle*, 135 U.S. 1, 64 (1890); *United States* v. *San Jacinto Tin Co.*, 125 U.S. 273, 279-280 (1888). Thus the President's power to select the Officers of the United States who will administer the laws passed by Congress is at the very core of the "executive Power" vested in the President by Artcle III.

C. The Power Of Removal

Although the Constitution expressly confers on the President the power to appoint Officers of the United States, it does not mention removal of such officers by the President. The only reference to removal is in Article II, Section 4, which provides that "[t]he President, Vice President and all civil Officers of the United States, shall be removed from Office on Impeachment for, and Conviction of, Treason, Bribery, or other high Crimes and Misdemeanors." The House of Representatives has "the sole Power of Impeachment" (Art. I, § 2, Cl. 5), and the Senate has "the sole Power to try all Impeachments" (Art. I, § 3, Cl. 6). This express provision for one method of removal by Congress of "all civil Officers of the United States" for specified causes negates any implication of a power in Congress to vest itself (or either of its Houses) with the authority to remove any such officer in some other manner or for some other reason.

By contrast, the absence of an express provision in the Constitution for the President to remove Officers of the United States who are responsible for the administration of the laws has never been thought to mean that the Constitution restricts that prerogative of the President. Such a construction would substantially impede the President in the fulfillment of his constitutional obligations. As this Court recently reiterated, the President is "entrusted with supervisory and policy responsibilities of utmost discretion and sensitivity[,] * * * includ[ing] the enforcement of federal law * * * and management of the Executive Branch—a task for which 'imperative reasons requir[e] an unrestricted power [in the President] to remove the most important of his subordinates in their most important duties.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749, 750 (1982) (quoting *Myers*, 272 U.S. at 134-135).

Moreover, the fact that the Constitution provides for the advice and consent of the Senate for *appointments*, but makes no comparable provision for participation by the Senate in *removals*, strongly indicates that the Constitution forecloses Congress from making the advice and consent of the Senate a condition to the President's exercise of his right to remove an Officer of the United States. Compare *Chadha*, 462 U.S. at 955-956; *Buckley*, 424 U.S. at 127. For, as Madison pointed out in the debate on this very point during the First Congress, the participation of the Senate in the concededly executive function of the appointment of the officers who will administer the laws is such an exception to the basic constitutional principle of the separation of powers that it must be construed strictly and not be extended by implication (1 Annals of Cong. 462, 463, 496-501 (J. Gales ed. 1789)). See *Myers*, 272 U.S. at 122-123.

The purposes underlying the requirement of the Senate's advice and consent to appointments as a check against the President's selection of a person who is unsuited to office certainly do not support such an extension. To the contrary, the imposition of such conditions

on removal would interfere with the very discretion that the Appointments Clause was intended to furnish the President to receive the assistance of subordinates in whom he has complete confidence, and it also would have the perverse effect of retaining in office a person whom even the President had determined was not suited to serve.[14] The result of implying any Senate role in removals would be seriously to undermine the unity and sense of responsibility that were deemed essential to the Office of the President as established by the Constitution. See *Myers*, 272 U.S. at 119, 121-122, 131-135; *The Federalist No. 66*, at 404. It therefore is not surprising that, as we now explain, the unrestricted power of the President to remove officers who are principally responsible for the administration of the laws was formally recognized by Congress at the time of the organization of the Government under the Constitution, and it has been acknowledged ever since.

1. *The Decision Of 1789*

The matter of the President's authority to remove the principal officers of government was considered by the First Congress during its debate on bills to establish the departments in the Executive Branch. The question arose as to whether the President inherently had, or should be affirmatively granted by Congress, the authority to remove the heads of departments, and whether the advice and consent of the Senate should be required for removals. Congress determined that, under the Constitution, the removal authority resides in the President alone. This "Decision of 1789" reflects a nearly contemporaneous construction of the Constitution by the First Congress, which was composed of many members of the Constitutional Convention. That construction is entitled to great weight. See, *e.g. Parsons* v. *United States*, 167

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[14] The advice and consent requirement as applied to removals would effectively enable the Senate, instead of the President, to choose the person (the incumbent) who will occupy an office in the future, contrary to Hamilton's assurance that the Senate would not be entitled to make such a choice. See page 19, *supra*.

U.S. 324, 328-330 (1897); *Myers*, 272 U.S. at 111-132. Compare *Marsh* v. *Chambers*, 463 U.S. 783, 786-790 (1983).

The reasons underlying Congress's decision are contained in three major speeches by James Madison.[15] The heart of Madison's arguments is contained in his speech of June 22, 1789 (1 Annals of Cong. 581-582):

> [I]f there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases.

Earlier in the debate, Madison had given three grounds for the thesis that the Constitution vests the removal power solely in the President. First, he relied on the general rule of construction that "the power of removal resulted by a natural implication from the power of appointing" (1 Annals of Cong. 496). Second, inasmuch as the President has the responsibility for the faithful execution of the laws (Art. II, § 3), he necessarily must have the authority to remove those officials he does not trust (1 Annals of Cong. 462-465, 496-501). See *Myers*, 272 U.S. at 121-122. Third, Madison referred to the "great principle of unity and responsibility in the Executive department, which was intended for the security of liberty and the public good" (1 Annals of Cong. 499). He also feared that government officers defying the President could join "in cabal with the Senate" (*id.* at 462), thus preventing their removal and substantially undermining the power of the President (*id.* at 462, 497-500).

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[15] June 16, 1789 (1 Annals of Cong. 461-465); June 17, 1789 (*id.* at 495-501); and June 22, 1789 (*id.* at 581-582).

The House of Representatives accepted Madison's arguments and approved the bill establishing the Department of Foreign Affairs in a form that was intended to be a legislative construction of the Constitution that the power to remove the Secretary of Foreign Affairs was vested in the President by virtue of the Constitution. 1 Annals of Cong. 580, 585, 591. The Senate (with Vice President Adams casting the deciding vote) concurred in this interpretation (*Myers*, 272 U.S. at 114-115), and the bill was passed in that form. Act of July 27, 1789, ch. 4, § 2, 1 Stat. 29.

2. *Subsequent Developments*

The large number of political dismissals by President Jackson raised again the issue of the President's removal power. See 2 J. Story, *Commentaries on the Constitution of the United States* § 1543 (5th ed. 1891). However, many of those who opposed President Jackson's actions nevertheless concluded either that the Decision of 1789 was based on the correct interpretation of the Constitution, or that it could no longer be challenged after nearly half a century of established constitutional practice. *Ibid. Myers*, 272 U.S. at 148-152; 1 J. Kent, *Commentaries on American Law* *310 (14th ed. 1896). This Court likewise regarded the Decision of 1789 as "having become the settled and well-understood construction of the [C]onstitution" (*In re Hennen*, 38 U.S. (13 Pet.) 258, 259-260 (1839)). See also *Blake* v. *United States*, 103 U.S. 227, 231-233 (1880); 4 Op. Att'y Gen. 1 (1842); *id.* at 603, 608 (1847); 5 *id.* at 288, 290 (1851); 6 *id.* at 4, 6 (1853).

Thereafter, beginning with the Currency Act of 1863 (§ 1, 12 Stat. 665), Congress passed a series of statutes relating to the removal of executive officers. See *Myers*, 272 U.S. at 165-166. The most important of these was the Tenure of Office Act of 1867, ch. 154, 14 Stat. 430 *et seq.*, which was passed during the period of conflict between President Andrew Johnson and Congress. Under that Act, members of the Cabinet were to hold office for the term of the President who had appointed them

and for one month thereafter, subject to removal with the advice and consent of the Senate. President Johnson vetoed this legislation on the ground that it conflicted with the well-settled interpretation of the Constitution, but it was repassed over his veto (*Parsons*, 167 U.S. at 340). "The continued and uninterrupted practice of the Government from 1789 was thus broken in upon and changed by the passage of this act" (*ibid.*). However, as soon as President Johnson's term ended, Congress relaxed those restrictions (Act of Apr. 5, 1869, ch. 10, 16 Stat. 6 *et seq.*), and President Grant, in his first annual message to Congress, recommended their complete repeal on constitutional grounds. *Myers*, 272 U.S. at 168. The Tenure of Office Act eventually was repealed (Act of Mar. 3, 1887, ch. 354, 24 Stat. 500 *et seq.*), with the intended result that

> the law will then stand as it stood from the foundation of the Government up to 1867, when, in a time of great party excitement, the said legislation was enacted, which, to say the least, was unusual, and tended to embarrass the President in the exercise of his constitutional prerogative.

H.R. Rep. 3539, 49th Cong., 2d Sess. 1 (1887).

3. *The Decisions In* Myers, Humphrey's Executor *and* Wiener

The question whether Congress can limit the President's power to remove top-ranking Executive Branch officials was presented to this Court in *Myers* v. *United States*, *supra*, nearly 40 years after Congress repealed the Tenure of Office Act. *Myers* arose under the Act of July 12, 1876, ch. 179, 19 Stat. 78 *et seq.*, pursuant to which postmasters were appointed by the President with the advice and consent of the Senate and could be discharged by him only in a like manner. This Court held that the 1876 Act unconstitutionally limited the President's power to remove such officers. In so holding, the Court thoroughly reexamined and endorsed the Decision of 1789 and the principles underlying it and traced the

acceptance of that Decision in subsequent years (272 U.S. at 110-154).

In particular, the Court reaffirmed that the President's power to appoint executive officers carries with it the power to remove them, and that the provision for the Senate to consent to appointments cannot be extended to removals (272 U.S. at 122). Moreover, the Court endorsed the view that Congress cannot interfere with the President's performance of his duty to take care that the laws be faithfully executed by curtailing his control over the subordinates whom he has appointed to assist him in that task (*id.* at 162-164, 177). The Court stressed, however, that where Congress wishes to limit the evils of patronage with regard to the tenure of *inferior* officers, it may do so by vesting the appointment of those officers (with limited power of removal) in the heads of departments, as the Appointments Clause allows (*id.* at 159-164). Finally, the Court stated that although the President cannot properly interfere with the quasi-judicial decisions of executive officers, he may consider their rulings as a reason for removal. Otherwise, the Court reasoned, the President "does not discharge his own constitutional duty of seeing that the laws be faithfully executed" (*id.* at 135).[16]

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[16] Justice Brandeis filed a dissenting opinion (272 U.S. at 240-295), as did Justice McReynolds (*id.* at 178-239), and Justice Holmes agreed with the conclusion they reached (*id.* at 177). In context, it would seem that the dissenters were principally concerned not to cast doubt on the constitutionality of statutes establishing the civil service system as an alternative to the "spoils system." Accordingly, Justice Brandeis emphasized that, in his view, the rationale of the Decision of 1789, involving cabinet members and other high-ranking officers, had no bearing on the President's power over postmasters, whom he regarded as "inferior officers" for purposes of the Appointments Clause. Justice Brandeis was of the view that because the Constitution permits Congress to set limitations upon the President's removal of inferior Officers by placing their appointment in the heads of department, Congress could exempt such Officers from the realm of patronage by making their removal dependent upon the consent of the Senate. Justice McReynolds likewise stressed that postmasters were, in his view, "inferior

Nine years after *Myers* was decided, the Court revisited the removal question in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). That case involved an attempt by President Roosevelt to remove a Commissioner of the FTC because of a disagreement on questions of policy (*id.* at 619). However, by statute (15 U.S.C. 41), FTC Commissioners were appointed for a term of seven years and were removable by the President only for "inefficiency, neglect of duty, or malfeasance in office." The Court sustained the constitutionality of this restriction on the President's removal authority. The Court reasoned that the FTC exercised what the Court termed "quasi-judicial" and "quasi-legislative" powers (295 U.S. at 624, 628, 629 (see pages 45-47 & note 31, *infra*) and was "wholly disconnected from the executive department" (295 U.S. at 630). The Court accordingly disapproved the language in *Myers* insofar as it recognized an unrestricted power in the President to remove officers who perform quasi-judicial functions (*id.* at 628, 632).

The last decision of this Court involving the removal of an Officer of the United States was *Wiener* v. *United States*, 357 U.S. 349 (1958). *Wiener* was a back-pay suit by a member of the War Claims Commission who had been removed by President Eisenhower for no reason other than the desire to replace him with a person of the President's own choosing (*id.* at 350). Despite the absence of any explicit prohibition on such a removal, the Court inferred from the premise that the War Claims Act precluded the President from influencing the adjudication of any particular claim that Congress intended the Commission to be independent of the President with respect to removal from office, at least in the absence

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officers" (see *id.* at 178, 187, 192). As the district court in this case concluded (J.A. 62 n.23), there can be no serious contention under the current statutory scheme that the Comptroller General, as the head of GAO, is an "inferior officer" whom Congress could immunize from Presidential removal by vesting his appointment in the head of a department.

of cause (*id.* at 356). As in *Humphrey's Executor*, however, the Court did not question the holding in *Myers* as regards the President's unrestricted power to remove " 'purely executive officers' " (357 U.S. at 352 (citation omitted)) and the bar to participation by the Senate in removals generally.[17]

II. THE EXERCISE OF AUTHORITY BY THE COMPTROLLER GENERAL PURSUANT TO SECTION 251 OF THE ACT VIOLATES THE DOCTRINE OF SEPARATION OF POWERS BECAUSE THE COMPTROLLER GENERAL IS SUBJECT TO REMOVAL BY CONGRESS AND IS AN OFFICER OF THE LEGISLATIVE BRANCH

Section 251 of the Balanced Budget and Emergency Deficit Control Act of 1985 is unconstitutional under the principles just discussed regarding the separation of powers under the Constitution. As we explain below in Point A, the functions assigned to the Comptroller General under Section 251 constitute the execution of the law. The Comptroller General cannot perform these functions because, as we explain in Point B, the Comptroller General is subject to removal by Congress under the organic act establishing his Office, and because, as we explain in Point C, he is an officer of the Legislative Branch who is intended to serve as an agent of Congress.

A. The Functions Assigned To The Comptroller General Under Section 251 Of The Act Constitute The Execution Of The Law

Section 251 of the Balanced Budget and Emergency Deficit Control Act vests in the Comptroller General the authority, and indeed the duty, to perform functions

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[17] In *Morgan* v. *Tennessee Valley Authority*, 115 F.2d 990 (6th Cir. 1940), cert. denied, 312 U.S. 701 (1941), the court of appeals sustained the President's removal of the Chairman of the TVA's Board of Directors. The court stressed that the Board did not adjudicate controversies and that administration of the TVA was an executive function. For these reasons, the Directors were found to be removable by the President at will (115 F.2d at 994).

that are critical steps in the execution of that law. Section 251(a) provides for the Directors of OMB and CBO to furnish the Comptroller General with a report for each fiscal year, containing an estimate of revenues and outlays, a determination of the projected deficit, and an estimate of real economic growth during various periods. After reviewing this report, the Comptroller General is required by Section 251(b) to prepare and submit his own report to the President and Congress. This "report" in fact is an order that the President must follow; all the difficult determinations requiring exercise of judgment in implementing the law are assigned to the Comptroller General.

Although the Comptroller General is to have "due regard for the data, assumptions, and methodologies used" by the Directors (§ 251(b)(1)), he is to undertake an independent analysis and is free to reach conclusions different from those of OMB and CBO. Section 251(b) first requires the Comptroller General to make broad judgments concerning the state of the Nation's economy and anticipated total budget outlays and receipts for the coming fiscal year, in order to project whether the budget deficit will exceed the statutorily prescribed maximum. The Comptroller General then decides the amount by which budget outlays must be reduced to bring the estimated deficit within the annual statutory maximum. He next specifies the amount by which outlays in each nondefense account must be lowered to achieve the required deficit reduction, and in the case of defense programs he specifies reductions at a more detailed, sub-account level. In both instances, he also must determine the base from which reductions are to be taken. These determinations depend in large measure on underlying predictions that are inherently uncertain and are based on assumptions about which there may often be sharp differences of professional opinion. That potential in fact is demonstrated by Congress's provision for the Comptroller General to choose between the views of OMB and CBO or to reach an altogether different conclusion.

The President is required to issue an order implementing the Comptroller General's report, without exercising independent judgment in any respect. And the President must do so even if the Comptroller General's report differs from that of the Director of OMB, the President's expert agent in these matters. Thus, once the Comptroller General completes his tasks of rendering economic and fiscal forecasts, and applying the law as he interprets it to all non-exempt accounts, his conclusions are binding upon and constitute, in substance, a directive to the President on which compliance with the Act throughout the Executive Branch is based. Indeed, the Comptroller General is required to report to Congress regarding the President's compliance with the Comptroller General's report. § 253 (J.A. 134).

The court below, after reviewing this statutory scheme, found that Section 251 "requires the exercise of substantial judgment concerning present and future facts that affect the application of the law—the sort of power normally conferred upon the executive officer charged with implementing a statute" (J.A. 72). The court further concluded that the Comptroller General is required to interpret the law enacted by Congress in order to "specify which particular budget items are required to be reduced by the various provisions of the Act (which are not in all respects clear), and in what particular amounts" (*ibid.*). This is "a power normally committed initially to the Executive under the Constitution's prescription that he " 'take Care that the Laws be faithfully executed' " (J.A. 72-73 (quoting Art. II, § 3)). On the basis of these considerations, the court below held that the Comptroller General's duties under the Act "cannot be regarded as anything but executive powers in the constitutional sense" (J.A. 73). Unless the term "executive Power" is to be rendered meaningless, this conclusion by the court below is unquestionably correct. Appellants do not appear to argue otherwise.

B. Responsibility For The Administration Of A Law Cannot Be Assigned To An Officer Who Is Subject To Removal By Congress

The text and purposes of the Constitution and this Court's decisions establish that the Constitution does not permit the assignment of responsibility for executing the laws to an officer, such as the Comptroller General, who is subject to removal by Congress. To conclude otherwise would be to permit the very uniting of legislative and executive powers that the Framers feared. For as the district court concluded: "Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey" (J.A. 75). Giving Congress such power over one responsible for executing the laws would violate a basic tenet of the separation of powers, identified by Madison, that "none of [the Branches] ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers" (*The Federalist No. 48*, at 308).

In fact, *Humphrey's Executor*, upon which appellants principally rely, expressly recognized this principle (295 U.S. at 629-630):

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. * * * The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there.

And of course the statute at issue in *Humphrey's Executor*, although it limited the President's power of removal, in no way sought to intrude Congress into the functioning of the Executive Branch by reserving to Congress the power of removal. As *Myers* held, the Constitution prohibits such an arrangement.

1. The Constitution provides for congressional removal of an Officer of the United States only upon impeachment by the House of Representatives and conviction by the Senate, and only for "Treason, Bribery, or other high Crimes and Misdemeanors" (Art. II, § 4). Removal is thus accomplished following a trial before the Senate, sitting as a court of impeachments (see Art. III, § 2, Cl. 3; *Kilbourn* v. *Thompson*, 103 U.S. 168, 191 (1880)), at which the Members are under oath and the concurrence of two-thirds of the Members present is necessary for conviction (Art. I, § 3, Cl. 6). These procedures were carefully wrought by the Framers in light of the delicacy and political faction that might often attend efforts by a multi-member legislative body to remove an officer of a coordinate Branch. See *The Federalist Nos. 65 and 66*, at 396-407 (A. Hamilton).

The provision in 31 U.S.C. 703(e)(1)(B) for removal of the Comptroller General by joint resolution bespeaks a conception that is very different from the one the Framers contemplated. Removal may be accomplished by a majority vote of each House, rather than the two-thirds vote required for conviction following impeachment, and the grounds for removal go far beyond treason, bribery, and other high crimes and misdemeanors to include "permanent disability," "inefficiency" and "neglect of duty." 31 U.S.C. 703(e)(1)(B)(i), (ii) and (iii). It is instructive in the latter regard that the Constitutional Convention declined to extend the power of impeachment to instances of "maladministration," in light of Madison's objection that "[s]o vague a term will be equivalent to a tenure during pleasure of the Senate" and Gouvernor Morris's observation that "[a]n election of every four years will prevent maladministration" (2 Farrand 550). The terms " 'high crimes [and] misdemeanors' " were substituted in place of "maladministration" (*ibid.*). See generally *id.* at 65-69, 116, 185-186, 499. This background of the impeachment provision makes clear that the Framers regarded deficiencies in the performance of an executive officer that are short of an impeachable of-

fense to be an impermissible basis for removal by Congress, and instead to be a matter for which the President is to be accountable directly to the people. Congress's reservation of the power to remove the Comptroller General by joint resolution for cause falling short of an impeachable offense therefore can only be understood as the reservation of a right to exercise substantive control over that officer, and it cannot be squared with the Constitution insofar as the Comptroller General exercises executive power. It follows that the Comptroller General cannot be vested with the very large executive authority under Section 251 of the Balanced Budget and Emergency Deficit Control Act.

The provision for removal of the Comptroller General only by Congress of course imposes an even more severe restraint on the President than would a provision for removal by the President subject to the advice and consent of the Senate. Under the latter arrangement, the President at least would initiate a removal, and the concurrence of only the Senate would be required. See J.A. 74-75. Yet even that lesser intrusion by Congress has been definitively rejected in the Decision of 1789 and *Myers*, and neither *Humphrey's Executor* nor *Wiener* casts any doubt on the proposition that participation by the Senate in the distinctly executive power of removal is constitutionally prohibited. The provision for removal by Congress of an officer who is responsible for administering the laws thus presents even more acutely the potential for undermining the unity and responsibility of the Executive in the administration of the law. Cf. *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 78-79 & n.30 (1982) (plurality opinion); *United States* v. *Raddatz*, 447 U.S. 667, 683 (1980); *id.* at 685 (Blackmun, J., concurring).[18]

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[18] Although a joint resolution to remove the Comptroller General from office would be subject to a veto by the President, that veto in turn could be overridden by a two-thirds vote of the Senate and House of Representatives (Art. I, § 7, Cls. 2-3). Congress thus

Of course, we intend no personal reflection upon the Comptroller General, nor upon his judgment or motives in issuing the report for fiscal year 1986, when we note that the statutory scheme Congress has established under Section 251 threatens the principle of Executive responsibility that was of such importance to the Framers. Congress has expressly authorized the Comptroller General to make estimates and judgments regarding budget reductions that may differ from those of the President's agent, the Director of OMB. The Comptroller General may choose to adhere to what might be widely different projections and recommendations by the Director of CBO, who is both appointed by and subject to removal by Congress. Section 251 thus requires the President to abide by the Comptroller General's report and execute the law, under the standards prescribed by Congress, in a way that may differ from the judgments he would have made. The President, therefore, cannot be held directly responsible by the people for the faithful execution of the laws —neither the budget reduction law itself nor the numerous laws affected by the spending reductions under that Act. Indeed, even if the Comptroller General were to act in a way that totally disragarded the statute's dictates, the President would be powerless because he has no removal authority. Section 251 thus destroys the unity of the Executive in the very way the Framers sought to avoid, "by vesting [power] ostensibly in one man, subject in whole or in part to the control and cooperation of others" (*The Federalist No. 70*, at 424).

2. The House of Representatives argues (Br. 27-31), however, that different considerations should apply with respect to removal of the Comptroller General because of what the House contends is the need to maintain congressional control over the expenditure of appropriated

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has reserved the authority to remove the Comptroller General even where the President opposes that action. And, conversely, the President cannot initiate a removal no matter how egregious the Comptroller General's personal conduct or performance in office might be.

funds. The House relies on the constitutional limitation that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Art. I, § 9, Cl. 7). However, that Clause was adopted to negate the existence of an *inherent* authority in the Executive to draw money from the Treasury. See *Cincinnati Soap Co.* v. *United States,* 301 U.S. 308, 321 (1937). It furnishes no basis for implying a right in Congress to appoint or remove the officers responsible for making administrative determinations regarding the expenditure of money when Congress has passed an appropriations act. To the contrary, the Clause refers to "Appropriations made by *Law*," and it is the Executive, not Congress, that is responsible for the execution of such a law.

Early plans for the government that were submitted to the Constitutional Convention in fact provided for the appointment of the Treasurer of the United States by Congress (2 Farrand 144, 168, 182, 570). The premises underlying this proposal were (i) that the money in the Treasury belongs to the people and "the legislature representing the people ought to appoint the keepers of it" (*id.* at 315), and (ii) that "[a]s the two Houses appropriate money, it is best for them to appoint the officer who is to keep it" (*id.* at 614). However, the provision was stricken, so that the Treasurer would be appointed "in the same manner with other officers" (*ibid.*). The House's argument for a unique power of congressional control over officers responsible for appropriated funds is inconsistent with this considered judgment by the Constitutional Convention. Hamilton similarly explained that "the application and disbursement of the public moneys in conformity to the general appropriations of the legislature * * * constitute what seems to be most properly understood by the administration of government," and that "[t]he persons * * * to whose immediate management these matters are committed ought to be subject to * * * [the Chief Magistrate's] superintendence" (*The Federalist No. 72*, at 435-436). As the House points out (Br. 27-28), Madison suggested during the First Con-

gress that the Comptroller of the Treasury perhaps should serve for a term of years rather than at the pleasure of the President—a suggestion that he later withdrew and that Congress declined to adopt (1 Annals of Cong. 611-614). But Madison did *not* suggest that the Comptroller of the Treasury could properly be made subject to removal by Congress.[19]

The district court therefore was clearly correct in holding that the statutory provision in 31 U.S.C. 703(e)(1)(B) for Congress to remove the Comptroller General is a fatal constitutional defect in those provisions of Section 251 of the Act that vest substantive responsibilities in the Comptroller General. See J.A. 71-78.[20]

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[19] Moreover, Madison's remarks, read in context, refer to functions similar to those now performed by the Claims Court: "settling and adjusting the legal claims of individuals against the United States." 1 Annals of Cong. 614. These remarks thus are not applicable to an officer who is given the far different executive function described in Section 251. See page 47, *infra*.

[20] Contrary to the assertions by the Senate (Br. 15) and the Comptroller General (Br. 29), this Court did not hold in footnote 165 of its opinion in *Buckley* (424 U.S. at 128) that the Comptroller General may administer laws passed by Congress. The Court in *Buckley* was concerned with the Federal Election Campaign Act of 1971 (2 U.S.C. (Supp. V 1975) 437a), which created a Federal Election Commission, none of whose members was appointed in accordance with the Appointments Clause. 424 U.S. at 137. In the brief footnote upon which the Senate and Comptroller General rely, the Court rejected the Commission's attempt to compare itself to the Comptroller General, who also had significant duties under the 1971 Act. 424 U.S. at 128 n.165. The Court simply observed that the Commission could draw no support from the status of the Comptroller General because the latter at least had been appointed in conformity with the Appointments Clause (*ibid.*). In other words, the Court held that the appointment of an individual in the manner described in the Appointments Clause is a *necessary* condition to his exercise of authority in the administration of the laws. Because the duties of the Comptroller General under the 1971 Act were not at issue in *Buckley*, the Court had no occasion to decide whether such an appointment is a *sufficient* condition, even where the officer has substantial ties to the Legislative Branch. Cf. 42 Op. Att'y Gen. 65 (1962); H.R. Rep. 2205, 55th Cong., 3d Sess. 11 (1899).

C. The Comptroller General Cannot Perform The Responsibilities Assigned To Him Under Section 251 Because He Is An Officer Of The Legislative Branch

As we have shown in Point B, the statutory authorization for Congress to remove the Comptroller General is in itself a constitutional obstacle to his exercise of the powers assigned to him by Section 251 of the Act. But the removal provision also is emblematic of a far deeper and more pervasive association between the Comptroller General and Congress, which renders the Comptroller General an officer of the Legislative Branch. Such an officer cannot execute the laws passed by Congress insofar as they affect persons outside the Legislative Branch.

1. In the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20 *et seq.*, Congress created the General Accounting Office (GAO) as an "establishment of the Government * * * independent of the executive departments and under the control and direction of the Comptroller General of the United States." § 301, 42 Stat. 23. Congress believed that it "needed an officer, responsible to it alone, to check upon the application of public funds in accordance with appropriations." H. Mansfield, *The Comptroller General: A Study in the Law and Practice of Financial Administration* 65 (1939). The Comptroller General was envisioned by Congress as the counterpart of the Director of the Bureau of the Budget, which Congress simultaneously established in the Executive Branch. §§ 201, 207, 42 Stat. 20, 22; see 61 Cong. Rec. 982 (1921) (Rep. Good); *id.* at 987 (Rep. Sisson).

The statutory provision for removal of the Comptroller General by Congress signifies the placement of his office in the Legislative Branch.[21] The importance of this

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[21] President Wilson vetoed an earlier version of the legislation, which provided for removal of the Comptroller General by concurrent resolution. 59 Cong. Rec. 8609-8610 (1920). In the version subsequently enacted into law (which was signed by President Harding), Congress revised the earlier bill to provide for a 15-year term of office and removal by joint, rather than concurrent, resolu-

provision goes far beyond the potential consequence of removal itself, because the constitutional principles of separation of powers are intended to preserve the integrity of the office, not any personal interest the incumbent might have in the office. As the district court recognized, once the Comptroller General is appointed, his continuance in office depends upon Congress's continued satisfaction with his performance (J.A. 75). The inclination to obey the wishes of Congress, real or imagined, inheres in such an arrangement and creates the potential for the influence by Congress over the administration of the laws that the Framers sought to prevent. See page 30, *supra*.

The significance of the removal provision further extends beyond even the congressional influence occasioned by the threat of removal. That provision properly serves as a constant reminder of the identity of the principal for whom the Comptroller General is an agent and to whom he is accountable in the performance of his duties.[22]

tion (§ 303, 42 Stat. 23-24). The change to a joint resolution did not eliminate President Wilson's objections, which were (i) that Congress could not limit the President's authority to remove an officer whom he had appointed with the advice and consent of the Senate, and (ii) that Congress could not in any event vest removal authority in itself. See 59 Cong. Rec. 8609-8610 (1920); F. Mosher, *The GAO: The Quest for Accountability in American Government* 55 (1979).

[22] The fact that the Comptroller General is appointed by the President does not preclude his being an agent of Congress and an officer of the Legislative Branch. Nothing in the Constitution prevents Congress from assigning to the President the task of selecting an officer that Congress itself could appoint. There often may be an advantage in its doing so, in light of the difficulty that would be experienced by a bicameral, multi-member legislative body in agreeing upon a particular individual. Cf. 2 U.S.C. 136 (Librarian of Congress appointed by President); 40 U.S.C. 162 (Architect of the Capitol appointed by President). But cf. *Eltra Corp.* v. *Ringer*, 579 F.2d 294, 300-301 (4th Cir. 1978).

This Court has held that the nature of an office is defined not only by the method of appointment, but by its tenure as well. See *United States* v. *Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1867). In this instance, the Comptroller General's tenure is defined by reference to Congress. See 61 Cong. Rec. 987 (1921) (Rep. Sisson).

However, there was more in the 1921 Act than the removal provision to establish the Comptroller General's status as an agent of Congress. That status also was demonstrated by Section 312 of the Act (42 Stat. 26), which required the Comptroller General to report to Congress regarding the adequacy of accounting and inspection by federal agencies, as well as every unlawful expenditure or contract. § 312 (d) and (c). The Comptroller General was further required to "make such investigation and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures," and to "direct assistants from his office to furnish the committee such aid and information as it may request" (§ 312(b)). These and similar provisions remain in effect. 31 U.S.C. 712(4) and (5), 717(d)(1)(A), 719(d) and (e). See *Bowsher* v. *Merck & Co.*, 460 U.S. at 828-829 n.4, 833-834, 844.

Consistent with these statutory duties, the congressional debates on the 1921 Act are filled with statements that the Comptroller General "is to be the arm of the Congress" (61 Cong. Rec. 983, 1080 (1921) (Rep. Good)) and a "representative of Congress," unlike the Director of the Bureau of the Budget, "who serves the President and who is the personal representative of the President" (*id.* at 1081 (Rep. Byrns)).[23] As Representative Byrns explained, the removal provision was included because "[Congress] felt that [the Comptroller General] should be brought under the sole control of Congress, so that Congress at any moment when it found he was inefficient and was not carrying on the duties of his office as he should and as the Congress expected, could remove him without the long, tedious process of a trial by impeachment" (*ibid.*).[24]

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[23] See also 61 Cong. Rec. 1084 (1921) (Rep. Fess) ("under the legislative [branch]"); 58 Cong. Rec. 7215 (1919) (Rep. Purnell) ("responsible only to Congress").

[24] See also 61 Cong. Rec. 987 (1921) (Rep. Sisson) ("The Congress of the United States will have absolute control of the man's

During the period of 65 years since the creation of the office, Congress repeatedly has made clear that it considers the Comptroller General to be an officer of the Legislative Branch. For example, the Reorganization Acts of 1945 and 1949 both specified that the Comptroller General and GAO are "a part of the legislative branch of the Government." § 7, 59 Stat. 616; § 7, 63 Stat. 205.[25] Similarly, in the Accounting and Auditing Act of 1950, Congress directed that the auditing of government accounts be "conducted by the Comptroller General of the United States as an agent of the Congress" (§ 111(d), 64 Stat. 835).[26] Moreover, the appropriations for GAO

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destiny in office."); *id.* at 1080 (Rep. Good) ("Congress has its remedy, and it can reach out and say that if the man is not doing his duty, if he is inefficient or guilty of any of these other things, he can be removed."); 58 Cong. Rec. 7138 (1919) (Rep. Tilson) (Comptroller General "should be easily removable by the responsible party in power in Congress"); *id.* at 7136 (Rep. Hawley) ("If he does not do his work properly, we, as practically his employers, ought to be able to discharge him from his office."); *id.* at 7129 (Rep. Taylor) ("[Congress] can throw him out very quickly, and they will not hesitate to do so."); *id.* at 7211 (Rep. Temple) ("this would give the legislative branch of the Government control of the audit, not through the power of appointment, but through the power of removal").

[25] Comptroller General Warren stated to Congress: "During most of my public life, * * * I have been a member of the Legislative Branch. Even now, although heading a great agency, it is an agency of the Congress, and I am an agent of Congress" (*To Provide for the Reorganization of Agencies of the Government: Hearings on H.R. 3325 Before the House Comm. on Expenditures*, 79th Cong., 1st Sess. 69 (1945)).

[26] Contrary to the contention of the Senate (Br. 14 n.13) and the Comptroller General (Br. 40 n.118), although GAO is included within the general definition of the term "Executive agency" in 5 U.S.C. 104 and 105, those provisions in fact confirm GAO's unique status. An "Executive agency" is defined as an "Executive department, a government corporation, and an independent establishment." 5 U.S.C. 105. An "independent establishment" in turn is defined as "(1) an establishment in the executive branch * * * which is not an Executive department, military department, Government corporation, or part thereto, or part of an independent establishment; and (2) the General Accounting Office." 5 U.S.C. 104. The GAO

are set forth annually in the Legislative Branch Appropriations Act. See, *e.g.*, Pub. L. No. 99-151, 99 Stat. 792 *et seq.*; H.R. Rep. 99-144, 99th Cong., 1st Sess. 31 (1985). Although the Comptroller General transmits a copy of his budget proposal to the President for inclusion in the annual budget, his proposal—with those of Congress and the Judiciary—must be included in the President's budget "without change." 31 U.S.C. 1105(b).[27]

Finally, in 1980, Congress provided that when a vacancy occurs in the office of the Comptroller General, a commission consisting of the Speaker of the House of Representatives, the President pro tempore of the Senate, and other congressional officials shall submit not less than three names to the President. The President then must select a nominee from that list or request additional names. 31 U.S.C. 703(a)(2). This new provision was included because of "the special interest of both Houses in the choice of an individual whose primary function is to provide assistance to Congress" (S. Rep. 96-570, 96th Cong., 2d Sess. 10 (1980)) and who "func-

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thus is listed separately and is not included in the general definition of the term "independent establishment," which includes such agencies as the FTC, FCC, SEC, and ICC.

[27] Similarly, the Contract Disputes Act of 1978, Pub. L. No. 95-563, 92 Stat. 2383, 41 U.S.C. (& Supp. II) 601 *et seq.*, specifically exempts the GAO from its coverage. 41 U.S.C. 601(2). The Senate report explained: "The judicial and legislative branches, including the General Accounting Office, are not subject to the provisions of this legislation. Acquisition activity by these agencies is relatively small, and subjecting them to regulations promulgated by the executive branch agencies could raise constitutional questions under 'the separation of powers' doctrine." S. Rep. 95-1118, 95th Cong., 2d Sess. 16 (1978). In the Ethics in Government Act of 1978, Congress specified by statute that GAO is within the "legislative branch" (2 U.S.C. 701(e)), and the Comptroller General accordingly is required to file his financial disclosure report with the Secretary of the Senate (2 U.S.C. 703(b)). See also 5 U.S.C. 2302(a) and (c), 3132(a)(1), 4301(1), 7103(a)(3)(A); 31 U.S.C. 731-755 (exempting GAO from Civil Service Reform Act provisions and establishing separate personnel system for GAO).

tions as an agent of Congress" (H.R. Rep. 96-425, 96th Cong., 1st Sess. 14 (1979)).[28]

This Court, too, has described the GAO as "an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress." *Bowsher* v. *Merck & Co.*, 460 U.S. at 844. The courts of appeals have similarly characterized the GAO as an agency of Congress and the Comptroller General as an agent of the Legislative Branch. See, *e.g.*, *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States* v. *McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *John Reiner & Co.* v. *United States*, 325 F.2d 438, 442 (Ct. Cl. 1963), cert. denied, 377 U.S. 931 (1964).[29] In a recent decision, the

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[28] The Comptroller General also has traditionally taken the position that his office is part of the Legislative Branch and is accountable to Congress. See note 25, *supra*; *In re Ex-Cell Fiber Supply, Inc.*, 62 Comp. Gen. 86 (1982) (GAO proceedings are not agency adjudications under 5 U.S.C. 551 because the APA "does not apply to the legislative branch, of what our Office is a part"); *In re J.C. Yamas Co.*, No. B-211105.2 (Comp. Gen. Jan. 19, 1984); R. Sperry *GAO 1966-1981, An Administrative History* 84 (1981) (published by the GAO) (the Comptroller General has "line responsibility to the Congress alone"). Indeed, in his brief (at 11) in this Court in *Miguel* v. *McCarl*, 291 U.S. 442 (1934), the Comptroller General, acting on his own behalf, defended his asserted power to overrule a decision by the Secretary of War to pay a retired Philippine scout on the ground that the GAO was carrying out the constitutional authority of the Legislative Branch. This Court did not address that issue. Cf. 291 U.S. at 450-451. It did, however, reject the Comptroller General's argument on the merits of the payment issue, finding that the Secretary's duty to pay under the governing statutes was so clear as to warrant mandamus relief. *Id.* at 451-454. The Court then added: "It seems unnecessary to add that this duty cannot be affected by a contrary decision of the Comptroller General." *Id.* at 454.

[29] In *Ameron, Inc.* v. *United States Army Corps of Engineers*, No. 85-5226 (3d Cir. Mar. 27, 1986), the court of appeals upheld the constitutionality of a provision of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, § 2741, 98 Stat. 1199-1201. The majority's analysis is both confused and seriously flawed. First, it erred in failing to take Congress at its word in placing the Comptroller General and GAO in the Legislative Branch and provid-

District of Columbia Circuit observed that "[s]ince the GAO has been thought to be 'an arm of the legislature,' * * * there might be a constitutional impediment [if de-

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ing for his removal by Congress. See *Nortnern Pipeline Construction Co.*, 458 U.S. at 61 (plurality opinion); cf. *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 540 (1962) (plurality opinion). Second, the majority's reasoning—that GAO performs enough other executive-type functions to justify characterizing it as a "hybrid agency" that is not actually part of the Legislative Branch—begs the question. The very issue before the court was whether the congressional removal provision and Congress's placement of GAO in the Legislative Branch prevent the Comptroller General from participating in the execution of the law.

In a separate opinion, Judge Becker correctly criticized the majority for believing that GAO could constitutionally be regarded as a "hybrid" agency located outside *any* of the three Branches (*Ameron*, slip op. 34-37, 45-46); concluded that the "legislative intent is clear—he belongs to the legislative branch" (slip op. 38); and further concluded that the Comptroller General's power to lift an automatic stay of a contract is executive in nature (slip op. 39-40). But although it would seem to have followed ineluctably from these premises that the statutory provisions were unconstitutional, Judge Becker nevertheless believed that the statutory provisions were valid because he did not perceive that the coalescence of powers in the Legislative Branch was sufficient to pose an actual threat to individual liberty in the particular context at issue (slip op. 40-44).

Judge Becker's amphorous, ad hoc approach completely misapprehends the doctrine of separation of powers and its particular expression in the context of appointments and removals. The powers were divided among the Branches as a structural matter in order to furnish a "self-executing safeguard" (*Buckley*, 4[illegible]4 U.S. at 122)—a prophylaxis—against potential abuses. A court is not free to disregard that constitutional structure based on its own view of whether the abuses the Framers feared are likely to occur in a particular instance. Judge Becker's reliance (see *Ameron*, slip op. 40-41) on this Court's decision in *Nixon* v. *Administrator of General Services*, 433 U.S. 425 (1977), also was misplaced. In that case, Congress had passed a law establishing standards and procedures for the disclosure of former President Nixon's papers; but, as the Court repeatedly stressed, Congress vested responsibility for administering that law in the Executive Branch, under the aegis of an official who was subject to the President's authority. See 433 U.S. at 441-446. Congress thus did not interfere with the President's responsibility to take care that the Presidential records law be faithfully executed through officers who were subject to his superintend-

cisions by the Comptroller General were given] * * * binding effect [on Executive Branch agencies]." *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 201 n.1 (1984) (quoting *M. Steinthal & Co.* v. *Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1971).[30]

2. Thus, Congress repeatedly has considered the status of GAO, and it repeatedly has determined that GAO is an agency in and of the Legislative Branch. "We rarely see as clear an expression of congressional intent." *Heckler* v. *Day*, No. 82-1371 (May 22, 1984), slip op. 13 n.30. The constitutional doctrine of separation of powers therefore bars the Comptroller General from performing functions—such as those under Section 251 of the 1985 Act—that involve the administration of the law, because he then is interfering with the operation of another Branch (*Nixon* v. *Administrator of General Services*, 433 U.S. 425, 442-443 (1977); *Humphrey's Executor*, 295 U.S. at 629-630) and affecting the legal rights and duties of persons outside of the Legislative Branch. *Chadha*, 462 U.S. at 952.

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ence. By contrast, in *Ameron* and this case, Congress vested responsibility for an aspect of administering the law in an officer who is subject to removal by Congress, not the President.

In any event, *Ameron* is quite different from this case. As the Third Circuit stressed (slip op. 25), under the statute at issue there, the Comptroller General only has authority to make a recommendation to the executive agency on the merits of the contract dispute; the constitutional issue arose only with respect to the narrow question of the Comptroller General's ability to affect the timing of the contract award. In this case, by contrast, the Comptroller General's report is immediately, permanently and pervasively binding on the President. The President has no authority to override that report when the agency's circumstances so require.

[30] Many scholars and commentators have recognized the position of the Comptroller General within the Legislative Branch and his direct accountability to Congress. See Langeluttig, *Legal Status of the Comptroller General of the United States*, 23 Ill. L. Rev. 556 (1929); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L.Q. 215, 240 (1936); F. Mosher, *supra*, at 104-105, 242; R. Sperry, *supra*, at 16-17; R. Brown, *The GAO: Untapped Source of Congressional Power* 5 (1970); H. Mansfield, *supra*, at 65, 248-251.

Congress disarranges the fundamental organization of the government under the Constitution if it attempts to invest itself, its Members, or its officers with either executive or judicial power. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). Because Congress may not itself execute the laws, it may not entrust that duty to its Members or agents. See *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928); *AFGE* v. *Pierce*, 697 F.2d 303, 306 (D.C. Cir. 1982). This limitation applies even when Congress has plenary authority to legislate in a particular subject area, as it did with respect to the elections involved in *Buckley*, the immigration and naturalization involved in *Chadha*, and the expenditure of appropriated funds involved in this case. *Buckley*, 424 U.S. at 134-135. Congress's authority to give directives by passing legislation does not permit it to delegate authority to execute its general commands to a legislative officer. As *Chadha* reaffirms, the Constitution empowers Congress to act only through the process of legislation.

III. THE SUBSTANTIVE REPORTING FUNCTIONS UNDER SECTION 251 CANNOT IN ANY EVENT BE PERFORMED BY THE COMPTROLLER GENERAL BECAUSE HE DOES NOT SERVE AT THE PLEASURE OF THE PRESIDENT

For the reasons stated in Point II, the statutory provision for the removal of the Comptroller General by Congress, and his status as an officer of the Legislative Branch, render the Comptroller General constitutionally disqualified to perform the substantive reporting functions assigned to him by Section 251 of the Balanced Budget and Emergency Deficit Control Act. But even aside from those defects, the Comptroller General cannot constitutionally perform the role contemplated for him. The duties involved are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President.

1. This Court held in *Myers* that the Constitution confers on the President the unrestricted power to remove officers who were appointed by him with the advice and consent of the Senate and who are responsible for the administration of the law. The Court regarded this power of removal as an element of the "executive Power" that is essential to the President's fulfillment of his obligation to take care that the laws be faithfully executed.

In *Humphrey's Executor*, while not questioning the result in *Myers*, the Court held that the Constitution does not bar Congress from imposing limitations on the President's ability to remove a member of a commission (the FTC) that was charged by Congress with the exercise of "quasi-judicial" functions. 295 U.S. at 628-629.[31] The Court stated that Congress has the authority to create

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[31] In describing the FTC's functions, the Court used the term "quasi-legislative" as well as "quasi-judicial." The former term cannot be understood to refer to the issuance of binding rules of broad applicability to implement the FTC's organic statute, because, as the district court pointed out (J.A. 66 n.24), the FTC did not assert that it possessed substantive rulemaking authority until 1962, well after *Humphrey's Executor* was decided. See *National Petroleum Refiners Ass'n* v. *FTC*, 482 F.2d 672, 693 (D.C. Cir. 1973), cert. denied, 415 U.S. 951 (1974).

It therefore appears that the Court may have used the term "quasi-legislative" in *Humphrey's Executor* to refer to two other aspects of the FTC's functions. The first was the FTC's investigations on behalf of Congress (see 295 U.S. at 621, 628). However, such investigations are similar to the functions performed by congressional committees, and they therefore may be performed by a person appointed by or subject to removal by Congress. *Buckley*, 424 U.S. at 137-138. The Comptroller General's duties under Section 251 of course are not limited to investigating and submitting recommendations; his report is legally binding.

The second activity the Court might have included under the rubric "quasi-legislative" was the FTC's interpretation and application of the law as an incidental aspect of individual adjudicatory proceedings (see 295 U.S. at 620-621, 624, 628, 629). However, in our view, that activity is more appropriately characterized for present purposes as "quasi-judicial," rather than "quasi-legislative," in nature. Cf. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). We therefore use the term "quasi-judicial" in the text to include that activity.

such bodies and to require them to act independently of executive control in the discharge of their duties. On this premise, the Court then held that "that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." 295 U.S. at 629. The Court also stressed that, in its view, the FTC was "wholly disconnected with the executive department" (*id.* at 630) and "exercise[d] no part of the executive power vested by the Constitution in the President" (*id.* at 628). The Court followed *Humphrey's Executor* in *Wiener* with regard to a member of the War Claims Commission, in view of the "intrinsic judicial character" of the Commission's duties.[32]

2. The Comptroller General's statutory responsibilities at issue in this case are wholly different from those

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[32] There is no occasion here to consider the current soundness of the premises underlying *Humphrey's Executor*. As the district court concluded (J.A. 61-70), developments since *Humphrey's Executor* do, however, appear to have cast a shadow upon those premises. For example, the Court explained in *Chadha* that the fact that Executive Branch officers perform what might be characterized as "quasi-legislative" or "quasi-judicial" functions does not mean that they are exercising something other than executive power within the meaning of Article II. 462 U.S. at 953 n.16. This Court also affirmed the decision in *Consumers Union* v. *FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc), aff'd, 463 U.S. 1216 (1983), which invalidated a legislative veto provision applicable to the FTC, thereby establishing that at least for that aspect of the doctrine of separation of powers, the FTC is not to be distinguished from other agencies in the Executive Branch.

'n addition, many of the executive departments and agencies currently perform "quasi-judicial" functions identical to that of the FTC upon which the Court focused in *Humphrey's Executor*. See, e.g., J.A. 74; *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 472 n.198 (D.C. Cir. 1982), aff'd, 463 U.S. 1216 (1983); *Marcello* v. *Bonds*, 349 U.S. 302 (1955); 42 U.S.C. 1395*oo*(f). Conversely, agencies such as the FTC often perform functions that are indistinguishable from the enforcement of the law undertaken by executive departments. Furthermore, agency decision-making in general is subject to greater due process protections, statutorily prescribed procedures for rulemaking and adjudication (see 5 U.S.C. 553-559), and provisions for judicial review (see 5 U.S.C. 701-706). See J.A. 69.

of the commissions involved in *Humphrey's Executor* and *Wiener* in two critical respects.

a. First, the Comptroller General does not act in a "quasi-judicial" capacity when he prepares and submits his report under Section 251 of the 1985 Act. He does not, for example, make findings of historical facts that are relevant to a discrete transaction or controversy affecting a particular private party; nor does he construe and apply a law passed by Congress only as an incident to such an adjudication. Rather, the Comptroller General must make broad determinations about the present and future state of the economy and anticipated federal receipts and expenditures. He then must interpret and apply the law on a government-wide basis in order to specify which budget items must be reduced by what amount. As the district court observed, the first of these is "the sort of power normally conferred upon the executive officer charged with implementing a statute" (J.A. 72), and the second is "similarly a power normally committed initially to the Executive under the Constitution's prescription that he 'take Care that the Laws be faithfully executed' " (J.A. 73 (quoting Art. II, § 3)).

Accordingly, unlike *Humphrey's Executor* and *Wiener*, the function involved here does not have an "intrinsic judicial character" requiring independence of action in the interest of identifiable private parties to administrative proceedings. Cf. *Heckler* v. *Campbell*, 461 U.S. 458, 467-468 (1983); *Bi-Metallic Investment Co.* v. *State Board of Equalization*, 239 U.S. 441 (1915). It therefore is not a function to which, under *Humphrey's Executor* and *Wiener*, a restriction on the President's power of removal might constitutionally be attached as an "appropriate incident" (295 U.S. at 629). Because Congress has altogether withheld from the President the power to remove the Comptroller General, it follows *a fortiori* that the substantive reporting requirements under Section 251 of the Act may not constitutionally be performed by the Comptroller General.

b. The second critical distinction between this case and *Humphrey's Executor* and *Wiener* is that the role of the Comptroller General under Section 251 is by no means "wholly disconnected from the executive department" (*Humphrey's Executor*, 295 U.S. at 630)—*i.e.*, it is not removed from the responsibilities of the President and those departments and agencies in the Executive Branch that Congress has not sought to make independent of Presidential control. To the contrary, the determinations contained in the Comptroller General's report—as well as the findings, predictions and legal judgments on which they are based—bind the President and the heads of all departments and agencies in the Executive Branch in the implementation of the deficit reduction requirements of the Act. As a consequence, the Comptroller General's report also has a direct and substantial impact on the execution by the President and his subordinates of the funding statutes and other laws under their respective jurisdictions that are dependent upon the availability of money appropriated by Congress. A more sweeping and pervasive connection between the Comptroller General's actions and the administration of the laws that are under the President's supervision and control can scarcely be imagined. In *Humphrey's Executor*, by contrast, the FTC's substantive activities were confined to a discrete subject matter that Congress had carved out for it, and the governing statute did not purport to authorize the FTC to impose its will on the President or the heads of other executive departments and agencies.

Whatever may be the nature and scope of the functions that Congress constitutionally may remove from the general administration of the laws and assign to an agency composed of members who are independent of the President's control, Congress clearly cannot vest in such an officer the authority to intrude upon and effectively direct the execution of the laws by the President and by the subordinate officers who serve at his pleasure and who are therefore subject to his superintendence in the per-

formance of their duties. Cf. *Nixon* v. *Administrator of General Services*, 433 U.S. at 443-444. Within the broad sphere of governmental activity in question here, such an arrangement would destroy the unity and responsibility of the Executive that the Framers concluded was essential for the vigorous execution of the laws and the welfare of the people. The resulting division of authority would "lessen the respectability" and "weaken the authority" of the President in the performance of his constitutionally assigned functions (*The Federalist No. 70*, at 426), "embarrass" and prevent "expedition" in the implementation of measures passed by Congress (*id.* at 427), diminish the Executive's accountability to the public (*id.* at 428-429), and create the potential for "animosities" that would "interrupt the public administration" (1 Farrand 96).

The intrusion upon the President's responsibility for the execution of the laws is particularly vivid in this case, because it is occasioned by the Comptroller General's issuance of binding determinations directly to the President himself. The Act requires the President to implement those determinations in a sequestration order, without the exercise by him of the independent judgment that the Constitution requires if he truly is to "take Care" that the laws be faithfully executed. The Constitution does not permit a lesser officer to impose directly upon the President administrative determinations of such sweeping impact and binding effect. Cf. *Nixon* v. *Fitzgerald*, 457 U.S. at 749-757; *Mississippi* v. *Johnson*, 71 U.S. (4 Wall.) 475, 499 (1866); *Kendall* v. *United States*, 37 U.S. (12 Pet.) 524, 610 (1838).

The Constitution provides that the President "may require the *Opinion* in writing, of the principal Officer in each of the executive Departments, upon any subject relating to the duties of their respective Offices" (Art. II, § 3 (emphasis added)). Use of the word "Opinion" strongly indicates that the Framers intended that the President's would be the ultimate judgment on the matter, and that he would remain free to disagree with the

views of the head of the department. This construction is confirmed by the plan for a Council of State to advise the President, which was submitted to the Constitutional Convention and which gave rise to the Opinion Clause. That plan expressly provided that the President "shall in all cases exercise his own judgment, and either conform to such opinions or not as he may think proper" (2 Farrand 337). See also *id.* at 367 (" 'their advice shall not conclude him, nor affect his responsibility for the measures which he shall adopt' "). Earlier in the debates, Madison had likewise expressed the opinion that the Executive might consist of one person, "aided by a Council, who should have the right to advise and record their proceedings, *but not to control his authority*" (1 Farrand 74 (emphasis added)). Cf. *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U.S. 103, 109-113 (1948).

Thus, if Congress passes a law that imposes responsibilities directly on the President to be undertaken in accordance with statutory standards, the President has the correlative right and duty to execute that law and (after obtaining the opinion of the heads of departments) to make any necessary legal or factual determinations that Congress has not resolved in the statute itself. Section 251 is unconstitutional because it vests the authority to make such determinations regarding the amount of the budget reductions not in the President or his agents, but in the Comptroller General, who is not subject to presidential control.[33]

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[33] The Comptroller General refers (Br. 19) to certain other administrative functions performed by GAO. Those functions of course are not involved here. However, we do not question the authority of the Comptroller General to conduct audits and investigations of Executive Branch finances and operations on behalf of Congress (see note 31, *supra*). Nor, of course, do we question the right of the Comptroller General to reach his own conclusions on questions of fact and law as they arise in the performance of that function and to report his conclusions to the agency concerned or to Congress. The degree, if any, to which and in what contexts

If the Comptroller General may exercise the sweeping authority under Section 251 over the operations of the departments and agencies of the Executive Branch that are subject to the President's control, it may be difficult to conclude that Congress cannot vest numerous other such powers in the Comptroller General or some other officer not subject to the President's superintendence—much as the legislative veto device gained currency at an accelerating pace prior to this Court's decision in *Chadha.* See 462 U.S. at 944-945. The Court should reject Congress's attempt to introduce into the system of government established by the Constitution the potential for such a drastic erosion of the strength, unity, and energy the Framers deemed essential in the Executive.

IV. APPELLANTS' ARGUMENTS FOR AVOIDING THE CONCLUSION THAT SECTION 251 IS UNCONSTITUTIONAL ARE WITHOUT MERIT

A. The Challenge To The Role Of The Comptroller Is Ripe For Judicial Resolution

The Senate contends (Br. 25-31) that the challenge to the Comptroller General's authority under Section 251 of the Act is not ripe for review because Congress has not sought to remove the Comptroller General pursuant to 31 U.S.C. 703(e)(1). The district court correctly rejected this contention (J.A. 56-57).[34] The Senate's argument

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the relevant statutes contemplate that such a determination is "binding" on the agency concerned, what the consequences of a "binding" effect might be, and the constitutionality of any such effect would present complex questions that could be resolved only in a particular legal and factual context. See, *e.g.*, *Miguel* v. *McCarl*, *supra*, discussed in note 28, *supra*, 42 Op. Att'y Gen. 405, 415-416 (1969); F. Mosher, *supra*, at 206-212; House Select Comm. on Government Organization, 75th Cong., 3d Sess., *Constitutionality of the General Accounting Office* (Comm. Print 1938). Suffice it to say that these other functions of the Comptroller General do not remotely resemble his sweping powers under Section 251. See note 29, *supra*.

[34] The Conference report on the Act states that the conferees "took into account both Article III of the Constitution and applicable case law relating to standing and ripeness" and agreed

proceeds as if the removal provision threatens only the personal interests of the incumbent and involves only a matter of intragovernmental relations. In response to similar arguments in *Chadha*, this Court emphatically rejected that narrow and parochial view of the separation of powers under the Constitution. 462 U.S. at 935-936, 940-943. The division of authority among the Branches and the system of checks and balances were intended to preserve the powers of each Branch, not as an end in itself, but in order to secure the liberty, property, and welfare of the people.

In this case, it is not the actual removal of an incumbent Comptroller General that would cause injury to a person affected by his actions. The impact of the removal provision arises while the Comptroller General remains in office and performs his duties. As the district court observed, "[i]t is the prior assertion of authority to remove embodied in the tenure statute that has the immediate effect, and presumably the immediate purpose, of causing the Comptroller General to look to the legislative branch rather than the President for guidance" (J.A. 58). For this reason, it is not necessary for Congress actually to attempt to remove the Comptroller General in order for the constitutional issue presented here to be ripe. The violation of separation of powers inheres in the very performance of functions under Section 251 by a person who is constitutionally forbidden to take such action.

In this respect, the instant case is no different from others in which this Court has ruled on challenges to the

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that the judicial review provisions "fit within those guidelines" and that "any actions brought pursuant to these expedited review provisions should be reviewed by the courts." H.R. Conf. Rep. 99-433, 99th Cong., 1st Sess. 100 (1985). The challenge to the Comptroller General's role must therefore be considered to be ripe for review if it is consistent with Article III. As we explain in the text, plaintiffs have clearly presented a sufficient claim of present injury and a ripe case or controversy regarding the constitutionality of the Comptroller General's authority under the Act.

constitutional authority of federal judges or other officers to perform tasks assigned to them by statute. For example, in *Northern Pipeline,* the Court considered a constitutional challenge to the exercise of judicial authority by a bankruptcy judge who did not have the protections required by Article III—even though no actual removal of the judge or diminution in his salary had been attempted. 458 U.S. at 60-61, 87 (plurality opinion). The Court stressed that the Article III guarantee of life tenure was intended to protect against the possibility that a judge might be influenced in his decisions by a desire to obtain reappointment and that the other protections likewise were intended to ensure the independence of the Judiciary (*id.* at 57-60). The Court held that the vesting of "essential attributes of judicial power" in judges who did not have those protections violated the fundamental principle "that the 'judicial Power of the United States' must be reposed in an independent Judiciary" (*id.* at 60, 87). "Such a grant of jurisdiction," the Court concluded, "cannot be sustained" (*id.* at 87). Accord *id.* at 89 (Rehnquist, J., concurring).

The challenge in this case is directly analogous. Here the claim is that essential attributes of the "executive Power" cannot be exercised by an officer who is subject to removal by—and hence is not independent of—Congress, and that "[s]uch a grant of jurisdiction cannot be sustained" (458 U.S. at 87). Contrary to the contention by the Comptroller General (Br. 27-33) and the Senate (Br. 27-31), a violation of the separation of powers doctrine in this setting does not require a showing of *actual* influence by Congress over a particular decision of the Comptroller General (whether by a threatened removal or in some other manner), any more than a violation of Article III depends upon a showing of an actual loss of the independence that life tenure and the protection against diminution of salary were intended to secure. In order to provide the broadest protection against abuse, the Constitution in effect erects a presumption that such circumstances may be present. See pages 14, 17,

supra. Within this framework, the district court was correct in concluding that "it is the Comptroller General's presumed desire to avoid removal by pleasing Congress, which creates the here-and-now subservience to another branch that raises separation of powers problems" (J.A. 57 (footnote omitted)). See also *Thomas* v. *Union Carbide Agricultural Products Co.*, No. 84-497 (July 1, 1985), slip op. 9-13 (Article III challenge to an arbitral scheme found ripe even though no plaintiff had been injured by the arbitrators' exercise of jurisdiction).

It is no answer that there is alleged or shown no instance that a decision—by a bankruptcy judge or the Comptroller General—was in fact influenced by a desire to satisfy the authority to which he is accountable. The argument about accountability through removal is structural, not personal; and in devising that structure the Framers guarded against the worst.

These principles are not confined to challenges to the authority of judicial officers. In *Buckley*, this Court concluded that the particular defect in the tenure of the members of the Federal Election Commission—their appointments in a manner other than that prescribed by the Appointments Clause—disabled them from exercising any of the powers of their offices except those in aid of Congress's legislative authority. The Court did not consider whether particular decisions they rendered were improper or were affected by the dangers against which the Appointments Clause was designed to guard. 424 U.S. at 137-143. Moreover, the Court found the challenge ripe for judicial resolution even though many of the FEC's powers had not yet been exercised. 424 U.S. at 113-118.[35]

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[35] See also *Palmore* v. *United States*, 411 U.S. 389 (1973); *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962); *United States* v. *Woodley*, 751 F.2d 1008 (9th Cir. 1985) (en banc), cert. denied, No. 85-5872 (Mar. 3, 1986). The Senate relies (Br. 27 n.36) on *Hastings* v. *Judicial Conference of the United States*, 770 F.2d 1093 (D.C. Cir. 1985), petition for cert. pending, No. 85-1301, but the allegations of injury in that case were quite different from those at issue here or in *Northern Pipeline*. In *Hastings*, the District of Columbia Circuit refused, on ripeness grounds, to consider the con-

The Senate's ripeness argument is unavailing in any event, because the fact that the Comptroller General is subject to removal by Congress is only one of the constitutional defects in his performance of the duties assigned to him under Section 251. Accordingly, if the specific challenge to the removal provision were found not to be ripe, it then would be necessary to consider whether either the Comptroller General's status as an officer of the Legislative Branch or the fact that he does not serve at the pleasure of the President disqualifies him from assuming the broad executive powers under Section 251. The Senate does not contend that those defects are in any way dependent upon an actual exercise of the removal power or that they are not ripe for judicial resolution. Because, as the district court recognized, the presence of the statutory removal provision furnishes the narrowest and most straightforward ground on which to invalidate the Comptroller General's role under Section 251, it makes little sense to avoid that ground of decision on the basis of the strained ripeness argument advanced by the Senate.

B. Because The Comptroller Cannot Exercise The Substantive Authority Assigned To Him Under Section 251, The Fallback Procedures Under Section 274(f) Must Be Given Effect

We have demonstrated in Points II and III that the Comptroller General was without authority under the Constitution to perform the duties conferred on him by

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stitutionality of actions that might be taken against the plaintiff judge at the completion of a judicial council investigation (770 F.2d at 1099-1102). No final action had been taken against Judge Hastings, and the court relied on principles of comity and exhaustion in relation to the on-going administrative proceedings in another circuit. By contrast, the individual plaintiff in this case is currently affected by the final actions of an official who is without constitutional authority. Although *Hastings* might support the proposition that the Comptroller General could not bring an action at the present time to challenge Congress's power to remove him, that decision does not undermine the ripeness of a constitutional attack on final governmental action by a person who is adversely affected by that action.

Section 251. The Comptroller General and Senate attempt to avoid that consequence by arguing (Comp. Gen. Br. 33-47; Sen. Br. 31-43) that the Court should sever the statutory provision enacted in 1921 that provides for congressional removal of the Comptroller General. But that judicial revision of the office of Comptroller General would not render Section 251 constitutional, and it would be remarkable in any event for a court to sever a provision in another Act that has been in effect for 65 years in order to save a statutory provision enacted only four months ago to confer sweeping and unfamiliar authority on the Comptroller General. Moreover, the result urged by appellants is contrary to the express desire of Congress, which specified what was to happen in the event Section 251 was held unconstitutional.[36]

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[36] The approach the Comptroller General and the Senate urge would in any event be a departure from this Court's settled practice. As the district court explained, "the cases specifically involving incompatible authorization and tenure (or appointment) statutes amply demonstrate [that] the courts set aside the statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff" (J.A. 59-60, citing *Springer, Myers, Northern Pipeline,* and *Buckley*).

The only decision of this Court relied upon by the Comptroller General (Br. 16-18) and the Senate (Br. 34-35) in support of a contrary result is *Glidden* v. *Zdanok*, 370 U.S. 530 (1962). However, that decision does not support their position. In *Glidden,* the Court held that judges of the Court of Claims and the Court of Customs and Patent Appeals were Article III judges. The plurality opinion found that those courts were constituted as Article III courts, despite the fact that Congress had authorized them to render advisory opinions, and the plurality found that Congress would have preferred the severing of the authorization for such opinions if that practice were inconsistent with the courts' Article III status. 370 U.S. at 579-583. Thus the effect of the plurality's approach in *Glidden* was consistent with that of the district court in this case, eliminating the jurisdiction that was deemed to be inconsistent with the tribunal's constitutional status, rather than altering that status. Moreover, there was no majority of the Court on the severability issue. The concurring Justices were of the view that the statutes providing for advisory opinions had been effectively repealed by Congress (*id.* at 586-587 (Clark, J., concurring)), and

1. This is not an instance in which the Court is required to speculate about what Congress would have intended if it had known that a particular provision in a statute would be held unconstitutional. Congress foresaw when it passed the 1985 Act that there would be constitutional challenges to the deficit reduction procedures in Section 251. It therefore provided for expedited judicial determination of such challenges (§ 274(a)(1) and (2), (c)) and for a carefully structured alternative reporting mechanism "[i]n the event that any of the reporting procedures described in section 251 are invalidated" (§ 274(f)(1)).[37]

This fallback procedure assures that Congress and the President—the elected representatives of the people—will make the projections and exercise the judgment that underlie a sequestration order, thereby eliminating the constitutional defects occasioned by the Comptroller General's issuance of binding determinations. Because Congress unequivocally directed that this fallback mechanism be followed if the reporting procedures are held unconstitutional, and because that mechanism " 'is fully operative as a law' " (*Buckley*, 424 U.S. at 108, quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)), there is no reason for this Court to prevent it from going into effect.[38]

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the dissenting Justices had no occasion to address the question (*id.* at 589-606 (Douglas, J., dissenting)).

[37] Under that alternative, the report of the Directors of OMB and CBO is to be submitted to a joint committee of Congress, composed of the entire membership of the Budget Committees of the House and Senate. § 274(f)(1) and (2). Within five days, the committee must report to both Houses a joint resolution setting forth the contents of the report of the Directors. § 274(f)(3). Upon its enactment, the joint resolution "shall be deemed to be the report received by the President under section 251(b)" (§ 274(f)(5))—*i.e.*, the Comptroller General's report—which then triggers the President's duty to make the sequestration order.

[38] In their memorandum in the district court (at 62-65), the Speaker and the Bipartisan Leadership Group of the House agreed with our submission herein. They stressed that Section 274(f) was

The Comptroller General argues (Br. 41) that the fallback mechanism does not apply if the reporting procedures are invalidated because of the role of the Comptroller General; in his view, it applies only if those procedures are invalidated because of the role of CBO or because Section 251 is found to be an unconstitutional delegation of legislative power. This argument is refuted by the plain language of Section 274(f)(1), which requires resort to the fallback mechanism "[i]n the event that *any* of the reporting procedures described in section 251 are invalidated" (emphasis added). Because the Comptroller General's report is central to the operation of Section 251, it hardly seems likely that Congress would have intended implicitly to exclude a constitutional defect in that report from the events that trigger the fallback procedure—especially since, under the fallback mechanism itself, the joint resolution is expressly "deemed" to be the report of the Comptroller General (§ 274(f)(5)). Neither the Senate nor the Comptroller General has pointed to any indication in the legislative history that Congress intended the fallback mechanism to apply to only some constitutional defects, or that Congress would have preferred to alter the tenure or status of the Comptroller General, rather than the reporting procedures under Section 251, if those procedures were invalidated. In fact, the Comptroller General concedes (Br. 40) that there is no mention of the congressional removal provision of the 1921 Act in the legislative history of the 1985 Act.[39]

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included because "[a]voiding uncertainty on this point was a matter of the absolutely highest importance to Congress" (House Dist. Ct. Br. 62), and argued that "[s]ince the Act's whole structure makes section 274(f)'s significance apparent, the Court would have to defy that whole structure to tamper with the specific instructions of that section" (House Dist. Ct. Br. 64). These appellants have now changed their position and endorse the severability argument advanced by the Comptroller General and Senate, albeit only in passing and without explaining why they have changed their minds. See House Br. 49 & n.58.

[39] The Comptroller General's suggestion (Br. 40) that Congress could not have anticipated that the Comptroller General's role

2. The Comptroller General and Senate's argument also ignores the fact that the elimination of the removal provision in the 1921 Act would affect not just the Comptroller General's role under Section 251 of the 1985 Act, but all of his functions—including his most basic duty of investigating expenditures and operations of the Executive Branch on behalf of Congress, which is constitutionally compatible with the congressional removal provision. See notes 31 and 33, *supra*. As we have explained above (see pages 36-38, *supra*), Congress created the office of Comptroller General to serve the needs of Congress and to be responsible to it alone. The removal provision is an integral feature of the office, serving to bring the Comptroller General "under the sole control of Congress" (61 Cong. Rec. 1081 (1921) (Rep. Byrns)) and to confirm that the office is a part of, and the Comptroller General is accountable to, the Legislative Branch. See pages 36-39 & notes 23, 24, *supra*. The Comptroller General's submission (Br. 33-37) that Congress in 1921 would have readily dispensed with the removal provision therefore is mistaken.

Moreover, since 1921 Congress repeatedly has reaffirmed the original conception of the office (see pages

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under the Act would be challenged is simply wrong. The President's signing statement indicates that Congress was well aware that the status of the Comptroller General was a potential constitutional defect: "[E]xecutive functions may only be performed by officers in the executive branch. The * * * Comptroller General [is an] agent[] of Congress, not [an] officer[] in the executive branch * * * * *. My administration alerted Congress to [this] problem[] throughout the legislative process in an effort to achieve a bill free of constitutionally suspect provisions." *Balanced Budget Legislation*, 21 Weekly Comp. Pres. Doc. 1490-1491 (Dec. 12, 1985). Moreover, the United States had previously challenged the Comptroller General's exercise of executive functions, and two cases in which that issue is raised received wide publicity. *Ameron, Inc.* v. *United States Army Corps of Engineers*, 610 F. Supp. 750 (D.N.J. 1985), aff'd, No. 85-5226 (3d Cir. Mar. 27, 1986); *Lear Siegler, Inc.* v. *Lehman*, No. 85-1125 (C.D. Cal. Nov. 21, 1985). See *Constitutionality of GAO's Bid Protest Function: Hearings Before a Subcomm. of the House of Comm. on Government Operations*, 99th Cong., 1st Sess. (1985).

39-41, *supra*), by enacting the provision in 1980 for Congress to play a formal role in the selection of the Comptroller General (see pages 40-41, *supra*) and by vesting new responsibilities in him that may well have been withheld in the absence of the removal provision and the nexus to Congress that it exemplifies. See, *e.g.*, J.A. 71-72 n.29. These numerous intervening statutes would have to be considered by a court in determining whether the provision for congressional removal—and all that it implies—properly could be extricated from the web of statutes that define the Comptroller General's status and functions. The very complexity of assessing the cumulative effect of these enactments underscores the fact that any refashioning of the office of Comptroller General would be uniquely the responsibility of Congress.

3. Judicial severing of the congressional removal provision in the 1921 Act would not in any event eliminate the other fundamental defect in Section 251, which is that the duties of the Comptroller General under that Section may be performed only by an officer who serves at the pleasure of the President. See pages 44-51, *supra*. For this reason, the Court should resolve any remaining doubts on the severability issue by construing the 1985 Act so as to avoid the serious constitutional question regarding the Comptroller General's role under Section 251 that would remain even if the congressional removal provision were severed from the 1921 Act. *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932).[40] All that is required for that purpose is to give effect to the fallback mechanism that Congress itself prescribed in Section 274(f).

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[40] As the district court observed, "[i]t is doubtful that the automatic deficit reduction process would have passed without [a role for the Comptroller General], and doubtful that the protection would have been considered present if the Comptroller General were not removable by Congress itself—much less if he were removable * * * at the discretion of the President, like the Director of OMB himself" (J.A. 60). The district court recognized that the latter tenure might be required by the Constitution in light of the nature of the Comptroller General's functions under Section 251 (*ibid.*).

CONCLUSION

The judgment of the district court should be affirmed. The Court should stay its judgment for 60 days to permit the operation of the fallback deficit reduction procedures contained in Section 274(f) of the Act. See *Buckley* v. *Valeo*, 424 U.S. 1, 143 (1976); *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 88-89 (1982); cf. § 274(e), (f)(3) and (4) of the Act.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

CAROLYN B. KUHL
Deputy Solicitor General

JAMES M. SPEARS
Deputy Assistant Attorney General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ROBERT E. KOPP
NEIL H. KOSLOWE
DOUGLAS LETTER
HAROLD J. KRENT
Attorneys

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Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, Comptroller General of the United States,
Appellant,
v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,
v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., Speaker of the United States House of Representatives, *et al.*,
Appellants,
v.

MIKE SYNAR, Member of Congress, *et al.*,
Appellees.

BRIEF OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET AL.*

Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer
Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704
Attorneys for Appellees

QUESTIONS PRESENTED

1. Did the district court correctly conclude that Congress constitutionally delegated the deficit reduction powers in the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Act"), where (a) the sole justification for the Act was Congress' unwillingness to vote for spending reductions and/or tax increases, (b) the Act provides virtually no guidance to those who must make the budget predictions required by it, and (c) the Act specifically exempts those predictions from all judicial review?

2. Did the district court correctly conclude that the role of the Congressional Budget Office under the Act did not involve a shared administration of the Act, in violation of the doctrine of separation of powers, because it was purely advisory, despite the extensive duties assigned to the Office, the admission of the Comptroller General that he has worked closely with the Office in making his determinations, and the considerable deference which the Act requires the Comptroller General to give to the report prepared jointly by the Office and the Office of Management and Budget?

3. Did the district court correctly conclude that the Comptroller General, who is appointed by the President from among three candidates suggested by Congress, who may be removed only by Congress through a joint resolution, and whose budget is determined entirely by Congress without Presidential interference, is subject to potential influence by Congress, and is therefore barred by the doctrine of separation of powers from making the determinations assigned to him under the Act?

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BRIEF OF APPELLEES MIKE SYNAR, MEMBER OF CONGRESS, *ET AL.*

This brief is submitted on behalf of appellee Mike Synar and the eleven other members of the United States House of Representatives (the "congressional appellees") who were plaintiffs in one of the two actions which are before the Court on this consolidated appeal. The United States, which is also an appellee, fully supports the judgment below, including the conclusion of the district court that the delegation of power in-

volved was not excessive and that the involvement of the Congressional Budget Office ("CBO") in the process of administering the law does not violate principles of separation of powers. The congressional appellees, like the appellee National Treasury Employees Union ("NTEU"), agree that the judgment of unconstitutionality should be affirmed. However, they disagree with the rulings below that the delegation was not excessive and that the role of CBO does not invalidate the process for making spending reductions. Accordingly, this brief will discuss only those two issues (questions 1 and 2) and will leave question 3 to the briefs of NTEU and the United States.

STATEMENT OF THE CASE

At issue on this appeal is the constitutionality of the principal spending reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 (the "Act"), more commonly known as the Gramm-Rudman Act. The purpose of the Act, which plaintiffs support, is to reduce the size of the federal deficit. The difficulty is that the means chosen to accomplish this end are fundamentally at odds with the constitutional requirements for making spending decisions under our democratic system of government.

In order to understand why the Act is unconstitutional, it is necessary to consider in much greater detail than did the district court and the briefs of the appellants the reasons why Congress passed the Act, including in particular what it hoped to accomplish through the legislation. It is then necessary to analyze the operation of the Act so that the precise functions performed by each of the principal agencies are clear and hence can be evaluated in light of the standards applicable to challenges based on the doctrines of undue delegation and separation of powers.

1. WHY GRAMM-RUDMAN?

With increasing frequency and fervor, individuals inside the government and out have expressed concern about the size of the budget deficit. The President, as well as members of Con-

gress in both Houses, in both parties, and of all different political views, are in seeming agreement that the deficits are simply too large. The problem has been that agreement has not been reached on how to either raise the additional revenues or reduce federal spending in sufficient amounts to balance the budget, or at least to reduce the deficit significantly.

For over a decade, since the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (the "Budget Act"), was passed, Congress has had a budget process which requires it to focus on the budget as a whole, before turning to individual appropriations bills. That has not been enough, however, in part because the various spending bills come to the floor separately, and the harsh choices can be avoided simply by voting for everything. Of course, nothing compels any member of Congress, let alone both Houses, to vote consistently to increase the deficit, but the many pressures on members tend to push in that direction.

One way to deal with the problem is a constitutional amendment to require a balanced federal budget each year. Such a measure obtained the necessary two-thirds vote in the Senate in 1982, but a similar resolution fell short in the House, although it did obtain more than a majority. *See* S. Rep. No. 99-163, 99th Cong., 1st Sess. 12 (1985). But even if such an amendment passed both Houses, it would still have to be ratified by three-quarters of the states within the seven years allowed, and hence such an approach would do nothing for the short or intermediate term problem.

This is the background that lead to the introduction on September 25, 1985, by Senator Phil Gramm and twenty-three other Senators, of S. 1702, the Gramm-Rudman bill, which was intended to be, and finally was, attached to a bill that could not be postponed or simply rejected, H.J. Res. 372, the bill to increase the ceiling on the national debt to $2,078,700,000,000. 131 Cong. Rec. S 12082 (daily ed.)[1]. There were no hearings,

[1] All references to Volume 131 of the Congressional Record are to the daily edition.

nor even a committee mark-up or report on Gramm-Rudman, although by the time it was approved by the Senate on October 10, 1985, *see* 131 Cong. Rec. S 13114, there had been nine days of debate on it, with several more in each House before it became law[2].

As a result, the basic purpose of the Act and the reasons for its passage must be gleaned from the floor debates and the structure of the Act itself, rather than from committee reports or even statutory statements of findings and purposes, of which there are none. Even the conference report has little of relevance since it primarily contains explanations of specific provisions in the Act. In order to fully appreciate the forces that impelled Congress to act as it did, it would be useful to read all of the floor debates on September 25, October 3-5, and December 11 in the Senate, and November 1 and December 11 in the House. There are, however, certain themes which recur throughout the debates, and which explain the rationale behind Gramm-Rudman in a way which is not only lacking in the briefs of the appellants and the opinion of the district court, but which is vitally important to understanding the gravamen of plaintiffs' first constitutional challenge—that Congress cannot delegate its constitutional responsibility to determine how taxpayer monies are to be spent, in the way that it did here.

First, Congress believed that the ordinary legislative process

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[2] After passing the Senate, H.J. Res. went to conference, and while that was proceeding, there were hearings in the House, the most relevant of which has been printed. *See* Hearing, *The Balanced Budget and Emergency Deficit Control Act of 1985*, Before a Subcommittee of the Committee on Government Operations, House of Representatives, 99th Cong., 1st Sess. (Oct. 17, 1985)("House Hearings"). On November 1, 1985, the House passed its version of Gramm-Rudman, *see* 131 Cong. Rec. H 9615, and the Senate then responded with its amended proposal. *See* 131 Cong. Rec. S 14924 (Nov. 6, 1985). The matter then went to conference again, where an agreement was reached, and the final version was reported to both Houses. *See* H.R. Rep. No. 99-433, 99th Cong., 1st Sess. (1985), *reprinted in* 131 Cong. Rec. H 11684-717 (Dec. 10, 1985)("Conf. Rpt."). This version was then approved by both Houses, 131 Cong. Rec. H 11903 (Dec. 11, 1985, appearing in Dec. 12 Cong. Rec.) and 131 Cong. Rec. S 17444 (Dec. 11, 1985), and on December 12, 1985, it was signed into law by President Reagan.

had failed to reduce the size of the budget. As Senators Gramm and Rudman explained it,

> . . . we admit once again that the budget process has failed and that we have failed. 131 Cong. Rec. S 12082 (Sept. 25, 1985, remarks of Sen. Gramm).
>
> The unfortunate fact, Mr. President, is that the political process generally and the budget process of the Federal Government has failed. . . . I will make no attempt to pinpoint blame for this failure; there is plenty to go around. But, it is clear that the status quo cannot be allowed to continue. 131 Cong. Rec. S 12085 (Sept. 25, 1985, remarks of Sen. Rudman).

Or, as one member of the House expressed the situation:

> The proposal we have before us today is a [sic] admission of failure. Failure of the congressional budget process. Failure of budget discipline. Failure of the House of Representatives as an institution. 131 Cong. Rec. H 11881 (Dec. 11, 1985, remarks of Rep. Daub).

Similar expressions of frustration with the legislative process were made throughout the debates. *See* Addendum at 1a-2a.

Second, the legislative history is rife with congressional recognition that pressures from the public to increase spending for various programs were too strong for most members to resist and that they simply lacked the will or discipline to vote to reduce spending or increase taxes. Thus, as one Senator stated when the bill was introduced:

> We know all too well that there are hundreds of special interest forces wanting us to spend money. The time has come to create a force which provides us with the discipline to say no. 131 Cong. Rec. S 12087 (Sept. 25, 1985, remarks of Sen. McConnell).

The same sentiment was echoed moments later by another of the bill's sponsors:

> It is only political nearsightedness which makes it seem that Congress is somehow prevented, by those whom it represents, from serving the best interests of the represented. 131 Cong. Rec. S 12088 (Sept. 25, 1985, remarks of Sen. Cohen).

Or, as the former chairman of the House Budget Committee put it:

> It is too bad that there is not enough political courage in this nation to cut the deficit without an artificial mechanism like Gramm-Rudman. In the absence of tough decisions, though, this conference agreement should have a positive effect. 131 Cong. Rec. H 11887 (Dec. 11, 1985, remarks of Rep. Jones).

See also Addendum at 2a-5a.

Thus, because Congress was unwilling to make the hard choices that have to be made to curb deficit spending, it searched for a new mechanism to demonstrate to the public its basic commitment to balance the budget. But it sought to accomplish this goal while continuing to allow members to approve spending for programs that, taken as a whole, would not reduce the deficit. Thus, as Senators Gramm and Rudman described the purpose of the bill:

> This process, however, guarantees that action will be taken. It guarantees that we do not have the luxury of simply passing the buck to the American worker in terms of higher deficits. It means that we do not have the freedom to pass the burden of decisions not made onto the backs of our children and grandchildren. It means that a solution will occur. It does not dictate which solution. But it does dictate that the time has come for choosing, and that a

> choice will have to be made. 131 Cong. Rec. S 12568 (Oct. 3, 1985, remarks of Sen. Gramm).
>
> Mr. President, the purpose of our proposal is to establish an enforceable process which ensures there will be a balanced budget in fiscal year 1990. 131 Cong. Rec. S 12085 (Sept. 25, 1985, remarks of Sen. Rudman).

See also Addendum at 5a-7a.

Several aspects of this legislative background are important. No one suggested that the problem was caused by issues that were too technical in the sense that they required expertise not possessed by Congress. Nor was the problem that there were too many decisions to make, or that Congress did not have time to review the relevant factors before arriving at a proper determination. Nor was the reason for Gramm-Rudman that Congress had other issues that were of higher priority, and hence it preferred to delegate budget decisions to others. Instead, the only problem that the Gramm-Rudman delegation was designed to solve was the lack of legislative will. Indeed, the delegation under Gramm-Rudman does not relieve the Congress of any of its legislative burdens, since members will still vote on every appropriation and tax bill just as they have always done. How Gramm-Rudman proposes to reach the goal of a balanced budget, while enabling members to continue to avoid voting against funding for popular programs, is the subject of the next section of this brief.

2. STATUTORY FRAMEWORK

The goal of the Act is to reduce the size of the annual federal budget deficit from its otherwise anticipated level of $200 billion or more for the foreseeable future, to zero by fiscal year 1991. Section 201(a) of the Act, adding new paragraph (7) to section 3 of the Budget Act, sets forth the annual steps for the decreases (*see* section 257(5)), and the Act creates a mechanism which is intended to ensure that the reductions in the deficit actually take place as planned.

Under the Budget Act, as amended by Gramm-Rudman, Congress passes an annual concurrent budget resolution by April 15, which is supposed to produce deficits no larger than the targets established by the Act. Those resolutions are not signed by the President, and thus they are only guidelines for the appropriations bills which actually determine the amount of spending, and hence the deficit. In order to make it difficult for Congress to exceed these limits, the Act makes it a point of order against a spending bill which exceeds the amount provided for that item in the concurrent resolution. *See* section 201 of the Act, *amending* section 302(f) of the Budget Act. J.A. 108.

Congress also recognized that even if the concurrent resolution shows a deficit meeting the statutory target, that does not automatically produce a deficit at that level. The first reason is that waivers of compliance with the concurrent resolution, while difficult to obtain, have all too often been granted, especially with changed circumstances. Second, and even more important, the amount of the anticipated deficit cannot be determined mathematically in advance simply by adding up the revenues and subtracting the authorized expenditures since there are a number of variables that affect both sides of the equation.

The difficulty in making the required estimate, and their central role in the budget process, can be seen from the President's *Budget of the United States Government, Fiscal Year 1986,* February 4, 1985 ("1986 Budget"). Chapter 3, entitled "Economic Assumptions and the Budget," contains twenty-five pages of text and charts which demonstrate the problems in making the various estimates and illustrate how essential it is that the forecasts be accurate. It also recognizes that changes in government programs (as surely will result from Gramm-Rudman) will themselves affect the economy and hence the deficit.

The clearest statement of the problem is on page 3-20 under the heading "Sensitivity of the Budget to Economic Assumptions":

> Both receipts and outlays are strongly affected by changes in economic conditions. Budget estimates and pro-

> jections, therefore, are a function of the economic assumptions upon which they are predicated, and are highly sensitive to changes in those assumptions.
>
> The sensitivity of the budget aggregates to economic conditions seriously complicates budget planning because forecasting the economy inaccurately leads to forecasting the budget inaccurately, and economic forecasting is not an exact science.

That section also emphasizes the importance of assessing the combined effect of all economic variables, which further complicates the process. Although the section suggests that there are rules of thumb that can help determine the offsetting effects of associated changes, the Chapter as a whole makes it clear how necessarily imprecise and arbitrary the entire process is, a view seconded by CBO Director Rudolph Penner in his testimony on Gramm-Rudman. House Hearings at 156-57, 181.

Among the most important of these variables in predicting the state of the economy is interest rates. With the government now nearly $2 trillion in debt, of which nearly $200 billion will be new debt in fiscal 1986, a small change in the projected interest rate would result in a significant change in the deficit. On the revenue side, the amount of money collected is dependent on income earned, which, in turn, is keyed to the gross national product—a figure on which very knowledgeable individuals, often with no political ax to grind or position to espouse, disagree substantially.[3] Similarly, the unemployment rate affects federal revenues because, with fewer people at work, there are less total earnings and hence less taxes paid by both individual wage earners and their employers. In addition, increased unemployment produces added expenses through greater unemployment compensation payments. Other imponderable but necessary adjustments are based on items such as the infla-

[3] For two recent discussions of the difficulties of making this forecast, *see* R. Samuelson, "Educated Guesswork," Washington Post, January 1, 1986, F.1, cols. 1-2, and "Gloomy Data Making Economists Uncertain on Outlook for Growth," New York Times, March 17, 1986, A.1, cols. 4-5.

tion rate, the international trade deficit, and even such matters as how much the federal government spends for oil, which varies depending on the strength of OPEC in enforcing higher oil prices and the severity of the winter.

In short, determining budget deficits is an extremely complex matter, and it is hardly the equivalent of balancing a checkbook or even determining the annual income for a large conglomerate corporation. Moreover, these estimates have to be determined several months before the start of the fiscal year to which the spending limitations apply, making these predictions even more hazardous. Indeed, as the Comptroller General acknowledged in his first report issued under the Act, "[e]conomic indicators continue to follow the mixed pattern that has prevailed since mid-1984, suggesting considerable uncertainty in forecasting the economy." GAO Report of January 21, 1986, at 45.

In recognition of both the non-binding nature of the concurrent budget resolution and the need to take into account subsequent legislative and economic developments, the Act creates a mechanism which is designed to ensure that spending levels in fact meet the target deficits, even if Congress appropriates excessive funds for various programs, or provides insufficient revenues.[4]

After the concurrent resolution is approved in April, two agencies are assigned to review the estimates, to take into account newly available evidence and the effect of the appropriations legislation being enacted, and to make a determination as to whether the target will be met. Both entities—the Office of Management and Budget ("OMB") and the Congressional Budget Office—have long been deeply involved in the budget process, with the former in charge of assisting the President in the preparation of the budget that he sends to Congress, and keeping him apprised of subsequent developments, and the latter advising the budget committees and Congress generally on

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[4] The description which follows will deal with fiscal year 1987, which begins on October 1, 1986. At the conclusion of that discussion, the special rules applicable to fiscal year 1986 will be noted.

all matters relating to budget decisions. 2 U.S.C. § 602. These two offices, one a part of the executive branch and the other of the legislative branch, are required to issue a joint report by August 20 that evaluates the results of the legislation passed as of August 15 (by which time Congress is generally in recess). In it they are to analyze the previously passed spending bills and make certain assumptions about spending levels in areas in which Congress has not yet acted in order to estimate as precisely as possible the anticipated deficit for the forthcoming fiscal year. Section 251(a)(1).

The contents of the report are spelled out in detail in section 251 of the Act. A crucial determination to be made is whether, after factoring in all of the relevant data, the target deficit for the year will be met, and if not, whether the excess will be more than $10 billion, which is the threshold for triggering the deficit reduction procedures in the Act. Congress also recognized that there would be differences of opinion between CBO and OMB and provided that, in such event, the report "shall average their differences," and "shall also indicate the amount initially proposed for each averaged item by each Director." Section 251(a)(5).[5]

If the two Directors determine that the target has been missed by $10 billion or more, the report must specify how much of a reduction shall be made in each program and account.[6] Although the job of allocating reductions is assigned to the Directors, the statute gives them almost no discretion in how these reductions are accomplished. First, the Act requires equal reductions from defense and non-defense programs. To achieve this, it eliminates all automatic cost-of-living adjustments mandated by statute, or reduces them to the point where the savings would eliminate one half of the excess deficit. To obtain the other half (or if eliminating the automatic increases is not sufficient to provide half of the savings, then that additional deficiency also), the re-

[5] However, as CBO Director Penner testified, there are substantial problems even with so seemingly simple a matter as averaging. House Hearings at 183, 192.

[6] There is no provision under which taxes can be raised in order to eliminate the excess deficit.

maining parts of the budget, other than items such as Social Security, programs for low income individuals, and a few others which are exempt in whole or in part, are reduced by a uniform percentage so that the deficit meets the statutory target for that year. The amount of that percentage is, of course, entirely dependent on the various estimates discussed above, to which the spending and revenue figures in the budget are keyed.

After the report is issued, the process accelerates rapidly, reflecting the fact that from then on the roles of the others who are designated by the Act to perform certain functions are in fact quite limited. The version of Gramm-Rudman initially passed by the Senate would have sent the joint OMB-CBO report directly to the President. *See* 131 Cong. Rec. S 13096, § (d)(1) (Oct. 10, 1985). However, because of doubts about the constitutionality of that process due to the involvement of CBO, an agency of Congress, the Senate proposed, and the House subsequently agreed, to have the Comptroller General, who heads the General Accounting Office ("GAO"), issue the final deficit reduction report. *See* 131 Cong. Rec. S 14911 (Nov. 6, 1985). This was done even though the question of whether the GAO could constitutionally carry out executive functions, because of his substantial allegiance to Congress, was currently the subject of litigation in the Third Circuit. *Ameron, Inc. v. U.S. Army Corps of Engineers,* 607 F. Supp. 962 (D.N.J. 1985), Nos. 85-5226 and 85-5377 (decided March 27, 1986).

There is another aspect of the role of the GAO in the spending reduction process under the Act which is important, particularly with regard to the argument made in Point II *infra*. There we assert that, because the Director of CBO is admittedly an officer of the legislative branch, and he has a substantive rather than purely advisory role in the process, there is a congressional sharing in the administration of the Act between CBO and GAO, which is itself a violation of separation of powers.

The structure of the Act virtually requires a sharing of responsibilities since, under section 251(b)(1), the Comptroller General is given only five days (which in the first two cycles include both a Saturday and a Sunday) to review the Directors' report, in-

cluding examining the methodology and disagreements between them, and to issue a final report to the President which "shall explain fully any differences between the contents of such report and the report of the Directors." Section 251(b)(2). Thus, unless the Comptroller General works closely with OMB and CBO in developing their report, he will have little choice other than to follow their joint estimates and adopt the average of their positions if they differ.

In the district court, in response to the claim by the congressional appellees that the Comptroller General would be little more than a rubber stamp, appellant Bowsher submitted an affidavit in which he disputed that characterization. He pointed to the plans that he had set in motion to handle GAO's responsibilities under the Act. Included among these were a meeting he held with CBO and OMB "to arrange for cooperation between the staffs of GAO, OMB, and CBO. . . to assure that GAO will understand the assumptions used and the theories underlying the report of the Directors [which] will facilitate our review of that report and preparation of my report for submission to the President. . . ." J.A. 23-24, ¶ 8. His affidavit then stated that there were "frequent discussions between the staff of GAO and those of CBO and OMB on a variety of procedural, technical and legal issues." J.A. 24, ¶9. He further noted that he anticipated "the cooperation of OMB and CBO" in a variety of respects, including the advance submission to GAO of the data to be used by the Directors in preparing their report. *Id.* In short, while there are references in the affidavit to the independence with which GAO will undertake its duties, the plain import of the submission is that, in order to avoid being a rubber stamp for the Directors, the Comptroller General will work closely with them so that, while the ultimate report will be his, the result will be based on a cooperative effort that will, in every realistic sense, be a joint effort of the three offices. In fact, the Comptroller General's report for the 1986 fiscal year acknowledged that it was based in part on "in-depth discussions with officials and staff of OMB, CBO, and the departments and agencies." GAO Report at 3.

After the Comptroller General's report is sent to the President on August 25th, the President must issue a directive, known as a sequestration order, by September 1, carrying out the reductions set forth in the report. Unless Congress passes alternative reductions by October 1 that would also meet the target, the sequestration order takes effect. As originally introduced, Gramm-Rudman would have given the President considerable discretion to decide which programs to cut within each budget account. Most of that discretion was removed on the Senate floor as a result of an amendment offered by Senator Levin, *see* 131 Cong. Rec. S 12944 (Oct. 9, 1985), and the remainder was eliminated by the House and the Conference. Accordingly, the President has virtually no discretion in choosing among programs, and appellees do not challenge the constitutionality of the Act on the grounds of excessive delegation to him. However, while eliminating the President's discretion, the conferees added section 274(h), which provides for unlimited discretion in another direction: it makes the "economic data, assumptions, and methodologies" used by the Comptroller General (*i.e.* those also used by the Directors) non-reviewable "in any judicial or administrative proceeding."

The Act also recognizes that Congress often acts on spending matters at the last minute, and so it provides for a second round of estimates which are to be made by the Directors on October 5, and by the Comptroller General on October 10, with the Presidential order, issued on October 15, to become effective immediately. Other than the timing, the reports and the sequestration order are subject to the same requirements as are the earlier ones.

The result of all of this is that, no matter what spending levels Congress or the President may approve, those levels will be reduced if the report of the Directors, as passed upon by the Comptroller General, determines that the stated deficit targets in the Act will not be met by $10 billion or more. Furthermore, the reductions required by the Act not only change the law on spending for the fiscal year in which the reductions occur, but under section 256(a)(1), cost of living increases that are not

allowed to take effect because of a sequestration order "shall not be taken into account for purposes of determining any automatic spending increase during any fiscal year thereafter." And section 256(a)(2) explicitly provides that any budget or other spending authority that is sequestered, except for money in special or trust funds, "is permanently cancelled."

The process actually used for fiscal 1986 was the same in principle, but adjusted slightly because that fiscal year began on October 1, 1985, and the Act was not signed into law until December 12, 1985. The first difference is that there was only one report by the Directors, due January 15, with the Comptroller General's report due January 21. Second, there is no $10 billion cushion by which the projected deficit may exceed the target before cuts are required. *See* section 251(a)(3)(A)(i). Third, the amount of the reduction required was prorated on a 7/12th basis starting March 1, 1986, and the total reduction could not exceed $11.7 billion. *See* section 251(a)(3)(A)(ii). Finally, the President was given a small amount of discretion within the defense account, only for fiscal 1986, to allocate reductions between personnel and other elements of the defense budget. *See* section 252(a)(3)(D).

There are numerous other technical provisions in the Act, but there is only one other provision which bears on the issues presented in this litigation. Unlike many cases in which a statute is declared unconstitutional, and the Court must decide what remains of the law, Congress has eliminated the question of severability here by including a specific back-up provision in section 274(f). Under that provision, if any aspect of the primary deficit reduction mechanism is declared invalid, a fall-back mechanism goes into effect, under which the report of the Directors (not the version approved by the Comptroller General) goes to a special joint budget committee of Congress, which then reports to both Houses, which will consider the matter on an expedited basis. Since the reductions described in the report will go into effect only if two Houses and the President concur (or both Houses vote to override his veto), there is no question that the fall-back is constitutional.

Moreover, while the fall-back mechanism lacks the automatic features of the primary provisions, it is far from a wholly cosmetic exercise. The reason is a practical one: the attention of the entire nation will be focussed on the debate and vote over the specific budget reductions outlined in the report of the Directors in a way which is very different from that of the ordinary appropriations bill in which only one part of the problem is on center stage. Under the fall-back, there is no place to hide, so that if Members do not vote to reduce the deficit, or do so in a politically unacceptable way, that will create an issue for their opponents, especially in election years such as 1986.

3. **PROCEEDINGS BELOW**

This action was filed on December 12, 1985, by Representative Mike Synar under the special review provision contained in section 274(a)(1) of the Act. Pursuant to paragraph 5 of that provision, a three-judge court was convened. On December 19, an amended complaint was filed, which added eleven additional plaintiffs who are also members of the House of Representatives. On December 30, the Senate and the Comptroller General moved to intervene, with the consent of the parties, and filed briefs on the merits. That same day, the Department of Justice, on behalf of the United States, filed a motion to dismiss for lack of standing, arguing that the jurisdictional provision in section 274(a)(1), which specifically grants standing to members of Congress, is unconstitutional. The following day appellee NTEU filed its complaint challenging the constitutionality of the trigger mechanism, and on January 2, 1986, the two cases were consolidated.

On January 6, 1986, the congressional appellees moved for summary judgment and responded to the motion to dismiss for lack of standing. With their memorandum of law on standing, they submitted the affidavit of Representative Synar (J.A. 17-19), which supported each of the claims of injury relied on in the complaint to support standing: (a) the unconstitutional

provisions interfere with the constitutional duty of members to enact laws regarding federal spending; (b) the salaries of the members and their staffs, as well as their office expenses, will be automatically reduced if the trigger is activated; and (c) thousands of their constituents will be injured through automatic reductions in a variety of programs once the trigger is activated. Their memorandum also explained precisely why, contrary to Justice's memorandum, the across-the-board cuts would inevitably reduce the salaries of their staffs and their office expenses, a point which Justice eventually conceded in its reply. Justice still maintained that the standing provision in the Act could not constitutionally apply unless the salaries of the members themselves were cut, but the parties did not reach agreement on whether those reductions would occur. Justice did not, however, challenge the standing of NTEU. The parties subsequently consented to the intervention of the Speaker and Bipartisan Leadership Group of the House of Representatives, and oral argument on all issues in both cases was held on January 10, 1986.

On February 7, 1986, the district court issued its unanimous opinion and order, holding that the trigger mechanism in sections 251 and 252 of the Act is unconstitutional. Initially, the court addressed the issue of standing, finding it necessary to rule on the standing of both sets of plaintiffs because there were separate cases which had merely been consolidated. J.A. 32. After finding that NTEU had standing (J.A. 34-36), it addressed the standing of the congressional plaintiffs and held that, under the law in the District of Columbia Circuit, they were entitled to maintain their action. The court based its decision on a finding that the congressional plaintiffs were injured in fact in their capacities as legislators because the Act interferes with their lawmaking duties. J.A. 37. It further found that the statutory grant of standing to them removed any possible "equitable discretion" to deny them access to the courts. J.A. 38. Accord-

ingly, it did not pass on the other standing grounds relied on by the congressional plaintiffs.[7]

On the merits, the district court rejected the argument that the delegation of the power to decide the amount of the budget deficit, and hence the amount by which the statutorily-mandated spending levels in most government programs would be reduced, was excessive. J.A. 38-55. The court analyzed the various factors cited by plaintiffs, but found that none of them was sufficient to strike down the delegation. In addition, in the court's view, this delegation was no different than those made to a ratemaking or price control agency. J.A. 45. As a result, the court did not address the distinction raised by plaintiffs that the reason that Congress passed Gramm-Rudman was not to assign fact-finding duties to an agency, but to reduce budget deficits without forcing Congress to vote for spending cuts or tax increases.

However, the court concluded that the Act violated principles of separation of powers because it assigned administrative responsibilities to the Comptroller General, an official who could be removed by a joint resolution of Congress, and never by the President acting alone, even for cause. In concluding that the removal power rendered the Act unconstitutional, the court made it plain that the continued potential for congressional influence over the actions of the GAO, not the inability of the President to fire the Comptroller General, created the constitutional flaw, because it was this possibility of congressional influence in the administration of the laws that breached the doctrine of separation of powers. J.A. 74. The court then concluded that, given Congress' explicit inclusion of the fall-back mechanism, the trigger mechanism could not be saved by striking down the removal provision. J.A. 78. These expedited appeals followed.

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[7] It is our understanding that the Solicitor General will not press his objections to the standing of either NTEU or the congressional appellees in light of the addition of Van Riddell, an individual member of NTEU who is concededly affected by the sequestration order. We agree that the Court need not decide those questions, although we contend that the standing of all the plaintiffs was properly decided below.

SUMMARY OF ARGUMENT

1. The trigger mechanism in the Act is unconstitutional as an undue delegation of legislative authority both because its sole purpose is to create an administrative device to reduce spending without concomitant congressional responsibility for the decision to do so, and because all of the factors utilized by this Court to determine whether a particular delegation is excessive demonstrate its unconstitutionality.

The Act is different from all other statutes previously challenged on delegation grounds in one important respect: the Act was not motivated by the practical need to carry out legislative choices, but was passed in order to foster legislative avoidance. The history of the Act is clear that the sole reason for Gramm-Rudman was that the sponsors believed that deficit reductions were desirable, but they were unable to muster the legislative support to bring about particular spending cuts or tax increases. While Congress may have thought that this statute was "necessary" in order to achieve a balanced budget, the Act must also be "proper" if it is to survive a constitutional challenge.

In almost every delegation upheld by this Court, the pragmatic necessities of implementing the law have been a major factor. The Court has recognized the impossibility of Congress legislating on matters such as individual tariffs, the minimum wage for different industries, and the maximum prices for goods and services in a regime of price control. For this reason it has upheld delegations to administrative officials as the only means of carrying out Congress's will. By contrast here, Gramm-Rudman relieves Congress of no burdens since it will continue to have to pass appropriations legislation every year during the life of the Act. The only difference is that future Congresses will be able to deny responsibility for spending reductions by blaming them on Gramm-Rudman. Since the only justification for the delegation is the desire to avoid political accountability, the delegation is necessarily improper.

Even under the traditional tests, the delegation must fail based on an analysis of all the relevant factors, taken as a whole. Of particular importance here are that (a) the law deals with a

primary legislative function—the power of the purse; (b) the extent of the delegation is virtually unlimited and the standards for its exercise almost non-existent; and (c) there is not even the minimal check of judicial review available to guard against arbitrary action.

2. The Act is also unconstitutional as a violation of principles of separation of powers, because it requires the participation in the administration of the Act by the Director of CBO, who is an official of the legislative branch. All parties agree that if the CBO had a formal decisional role in the process, the Act would be unconstitutional. Its supporters defend the Act by claiming that the role of CBO is purely advisory and hence not improper.

Under the original version of the Act, CBO and OMB had the joint responsibility for making the operative determinations. In order to avoid the constitutional questions raised by that plan, Congress gave to the Comptroller General the duty to review the joint OMB-CBO report and issue his own report based on theirs. That change did not, however, transform the role of CBO into a purely advisory one, since the Act requires GAO to consider the CBO-OMB report fully and to explain any differences between that report and GAO's. Furthermore, the Comptroller General has acknowledged that, in order to make the Act work under the extremely short timetable available for his review, he has established a close working relationship with OMB and CBO—precisely the kind of sharing in the administration of the law between executive and legislative officials that separation of powers forbids. Moreover, this problem of a congressional role in the administration of the Act is exacerbated because the Comptroller General is also subject to other congressional influences, principally because he may be removed by a joint resolution of Congress, and is immune from discharge by the President, even for cause.

ARGUMENT

THE PROCEDURES BY WHICH THE SPENDING REDUCTIONS ARE MADE ARE UNCONSTITUTIONAL.

I. THE ACT IMPROPERLY DELEGATES LEGISLATIVE AUTHORITY TO REDUCE SPENDING LEVELS.

Article I, Section 1 of the Constitution provides that all lawmaking powers shall be vested in the Congress, and Article I, Section 7 requires that both Houses of Congress and the President be involved in any lawmaking decision. Moreover, as made clear by this Court in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the lawmaking provisions of Section 7 are the exclusive means by which laws may be made. It is also clear, however, that not all rules which have the force and effect of law must be made by Congress. For many years it has been recognized that the authority to issue binding rules can be delegated to administrative agencies, provided that the delegation is not "excessive." The question in each case becomes whether Congress has crossed the boundary between lawful delegation and invalid lawmaking.

This Court explicitly recognized nearly 75 years ago that "it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations." *United States v. Grimaud*, 220 U.S. 506, 516-17 (1911). Or, as Justice Burton explained in *Lichter v. United States*, 334 U.S. 742, 779 (1948), the "degree to which Congress must specify its policies and standards in order that the administrative authority granted may not be an unconstitutional delegation of its own legislative powers is not capable of precise definition." However, in drawing that line, we believe that the views of Justice Harlan, joined by Justices Stewart and Douglas in their dissenting opinion in *Arizona v. California*, 373 U.S. 546, 626 (1963), are a helpful statement of the purpose of the doctrine and lead to the conclusion that the delegation here is excessive:

> The principle that authority granted by the legislature must be limited by adequate standards serves two primary functions vital to preserving the separation of powers required by the Constitution. *First*, it ensures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged. (Emphasis in original, footnote omitted).

Our argument on the delegation issue is divided into two parts. First, we argue that the unique history of this delegation, in particular its admitted goal of enabling Congress to reduce the deficit yet avoid the responsibility for voting for reductions in specific programs, dictates that this Court should refuse to uphold it. For this reason alone, this Court should set it aside rather than review it as if Congress had passed the Act because the practical realities of governing left it no choice but to assign to an administrative agency the job of making the thousands of decisions needed to carry out its will. Second, even if the traditional tests for undue delegation apply, the totality of the factors here establish that the trigger mechanism constitutes an undue delegation of legislative authority.

A. Because The Purpose Of The Act Is To Circumvent A Failure Of Legislative Will, The Delegation Cannot Be Upheld As An Accommodation To The Practical Necessities Of Governing.

The fundamental flaw in the briefs of the appellants is their failure to discuss, let alone appreciate the significance of, the reason for the enactment of Gramm-Rudman. But, as this Court observed in *United States v. Lovett*, 328 U.S. 303, 307 (1946), a ruling on the constitutionality of a statute requires "an interpretation of the meaning and purpose of the section, which in turn requires an understanding of the circumstances leading to

its passage." The district court's opinion is also void of any recognition of the significance of those circumstances, and as a result the court drew upon false analogies with other laws passed for very different reasons. Those differences are not simply matters of degree, nor do they relate only to different subject matters; rather they go to the heart of the rationale for Congress's decision to delegate in those cases as contrasted with the reasons for doing so here, and therefore those differences vitally affect the outcome of the delegation at issue here.

One sentence found in the brief of the Comptroller General in this Court illustrates how appellants have slid by this problem: "Despite a widespread consensus that the deficits must be reduced, both Houses of Congress and the President have been unable to enact a formula of budget cuts and/or revenue increases that would achieve the needed reduction." (Br. 2). A quick reading of that sentence would lead one to assume either that Congress had uncertain knowledge about the problem, that the issues were too complex for its resolution, that it needed further information or expert opinion, that the decisions should be made in an adjudicatory setting, that the process needed flexibility to turn on or off the specific remedies in response to changing conditions in the economy, or that the decisional process cannot operate in public, as Congress does, and still be effective.[8] Of course, none of those assumptions accurately depicts why Gramm-Rudman was passed. Indeed, as we demonstrated above (pp. 2-7), Congress and the President have been "unable" to enact such laws only in the sense that they have been unable to reach agreement, *i.e.,* they do not have the votes required by the Constitution to enact specific solutions that lower the deficit.

This is not a case in which Congress had multiple motives, some of which may arguably have been improper. *See United States v. O'Brien*, 391 U.S. 367, 382-86 (1968). There is only one purpose for creating the Gramm-Rudman automatic trigger mechanism: to lower the budget deficits without requiring

[8] This last reason plainly distinguishes the delegation here from the broad powers delegated to the Federal Reserve Board and the Federal Open Market Committee. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979).

members to vote for specific spending cuts or tax increases. Nor is this a case, like *O'Brien*, where the claim of an improper purpose is based on a few statements in the legislative history, some of them by opponents. As described above at 5-7 and in the Addendum, the purpose behing the trigger is undisputed by anyone in Congress or elsewhere. Therefore, the traditional unwillingness of the Court to seek to ferret out a possibly illegitimate congressional motive cannot be the basis for declining to rely on one when, as here, there is no dispute about what Congress had in mind in passing this law. And given the absence of any other purpose for Gramm-Rudman, the Court need not be concerned with trying to decide whether Congress would have passed it for only proper reasons, or with balancing proper against improper motives in deciding the fate of the Act.

The district court suggested that no case had ever turned on the difference between political necessity and pragmatic necessity. J.A. 46. Although we agree that no case has specifically drawn that distinction, countless decisions have relied upon pragmatic necessity to support delegations which might otherwise have been viewed as excessive. Thus, in *Bowles v. Willingham*, 321 U.S. 503, 515 (1944), the Court observed:

> In terms of hard-headed practicalities Congress frequently could not perform its functions if it were required to make an appraisal of the myriad of facts applicable to varying situations, area by area throughout the land, and then to determine in each case what should be done. Congress does not abdicate its functions when it describes what job must be done, who must do it, and what is the scope of his authority. In our complex economy, that indeed is frequently the only way in which the legislative process can go forward.

Similar sentiments were echoed in *American Power & Light Co. v. Securities & Exchange Comm'n*, 329 U.S. 90, 105 (1946):

> The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand

> myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impractical to compel Congress to prescribe detailed rules. . . .

Or, as Chief Justice Stone observed, speaking for the Court in *Opp Cotton Mills, Inc. v. Administrator,* 312 U.S. 126, 145 (1941), "[i]n an increasingly complex society Congress could obviously not perform its functions if it were obliged to find all the facts subsidiary to the basic conditions which support the definite legislative policy in fixing, for example, a tariff rate, a rail rate, or the rate of wages to be applied in particular industries by a minimum wage law." *See also* the concurring opinion of Justice Rehnquist in *Industrial Union Dep't, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 675 (1980)("*IUD v. API*"), where he observed that practical considerations are relevant where "the field is sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert in the field. . . ." Even when this Court set aside the delegation in *Panama Refining Co. v. Ryan*, 293 U.S. 388, 427 (1935), it noted that delegations could be upheld where "Congress legislated on the subject as far as was reasonably practicable, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute," *quoting Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). As Chief Justice Stone summarized the law in *Yakus v. United States*, 321 U.S. 414, 424 (1944), the Constitution "does not demand the impossible or the impracticable." Indeed, there is hardly a case in this Court dealing with a delegation issue in which the pragmatic realities of the situation were not clearly in the Court's mind in determining whether the delegation was proper.

One reason that no decision of this Court since *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), has overturned a delegation is that in no case since then can it fairly be said that the purpose of the delegation was to enable Congress to evade its lawmaking responsibilities. While the

statute in *Schechter* had many faults, one of them clearly was an attempt by Congress to hand off to private parties the difficult decisions of how to bring about industrial recovery in the midst of the Depression. Thus, while no case has ever held that necessity is the mother of delegation, Justice Cardozo observed in his concurring opinion in *Schechter* that proper delegation "is born of the necessities of the occasion." 295 U.S. at 552. All of those decisions clearly imply that their outcome is a product of the realities of our modern society, and we now ask the Court to recognize explicitly that fact as a prerequisite for upholding broad delegations and to deny Congress the right to delegate, where, as here, its sole purpose is to "abdicate its functions." *Bowles v. Willingham, supra*, 321 U.S. at 515. At the very least, we urge the Court to insist upon far more rigid standards in cases such as this in determining whether Congress has unduly transferred its lawmaking powers to administrative officials.

Two other aspects of the doctrine of necessity bear on the constitutionality of this Act. Insofar as Congress may seek to defend this law on the ground that the expert judgments of administrative officials are needed, that cannot suffice since those judgments have been available in the past and can readily be obtained in the future without delegating the decision-making authority as the Act does. Thus, OMB and CBO are already deeply involved in the budget process, and nothing prevents GAO from participating also if Congress should so choose. Congress can request as much help as it needs from whomever it chooses, whenever it needs it, and in whatever format is most useful. All of the data supplied to it can be made public, and Congress can write procedures requiring that the advice provided by experts be given careful consideration without Congress abdicating its lawmaking responsibilities. Indeed, that is basically what will be done if the fall-back mechanism should go into effect, and the report of the Directors, predicting the deficit for the next fiscal year based on the current status of the appropriations legislation, is submitted to the joint budget committee of Congress. But, like other reports, it would be purely advisory, and it would be up to Congress and the President to

vote on the report, rather than having reductions automatically made based on the findings of three administrative officials.[9]

Second, the Gramm-Rudman mechanism will not relieve Congress of a single burden which it now has. It will have to vote on the concurrent budget resolution every April, it will have to approve all appropriations bills for all agencies, just as it has done for nearly 200 years, just as it did for fiscal 1986 before Gramm-Rudman became law, and just as it did a week later on the continuing resolution for fiscal 1986, which is the minimum that will be needed every year to keep the government running. But there will be one difference: the votes taken will not really count but will simply produce a budget ceiling.

Assume, for example, that appropriations bills for the Defense and Transportation Departments are enacted into law this July. If GAO's report in August predicts that the target deficit will not be met, the amounts contained in those appropriations statutes will be reduced by the required percentage unless the Congress enacts other legislation to achieve the required deficit levels. Thus, the real change made by Gramm-Rudman is that, as Senator Gorton said, "the consequences of inaction or a deadlock will be that we will nonetheless proceed in the direction of a balanced budget and of a stronger economy." 131 Cong. Rec. S 12574 (Oct. 3, 1985). But the workload on Congress will not be reduced, and in fact it might actually be increased if Congress has to take a second look at already-passed appropriations legislation in order to find alternative means for achieving the Gramm-Rudman cuts. The district court referred to the Gramm-Rudman process as

[9] Interestingly, even the current balanced budget constitutional amendment, S.J. Res. 225, recently rejected in the Senate, *see* 132 Cong. Rec. S. 3345 (March 25, 1986), does not contain any enforcement mechanism in it. One of its principal sponsors, Senator Hatch, stated on the floor that it is "designed to promote its own enforcement through political processes [and to] the extent that the amendment succeeds in creating a more useful flow of political information to the electorate, and this is a major objective of the amendment, it will be enforced most effectively at the polls every other November." 132 Cong. Rec. S 2164 (March 6, 1986). *See also* S. Rep. No. 99-163, *supra*, at 56-63, emphasizing role of political processes in enforcing the amendment.

"legislating in contingency" (J.A. 46), apparently meaning that the operation of the Act itself was contingent. But the real contingent legislation will be the future appropriations acts in which the final numbers will only be determined by the predictions of the expected deficits made by three unelected officials, rather than by the two Houses of Congress and the President. It is only in those cases where a spending bill is part of the final legislative package for the fiscal year that members will know whether the amounts in the bill will govern, or whether sequestration will have the final vote as a result of the permanent rider that Gramm-Rudman has attached to all appropriations bills for the next five and a half years.

An understanding of the reasons why Congress passed Gramm-Rudman also explodes the myth that the statute is not an undue delegation because Congress has made the hard choices, as it must since it is "the branch of our Government most responsive to the popular will." *IUD v. API, supra,* 448 U.S. at 685 (Rehnquist, J., concurring). First, the whole reason for passing Gramm-Rudman was that Congress could not make the hard choices, *i.e.*, it could not make specific decisions to cut specific programs or enact specific tax increases. It is true that Congress made some choices in Gramm-Rudman, for instance by excluding Social Security and some other programs, and by allocating the mandatory cuts equally between defense and nondefense spending. But if Congress had really made the hard choices, there would have been no reason to enact Gramm-Rudman at all. Thus, for fiscal 1986 Congress knew that before it could adjourn in December 1985, it had to pass a continuing resolution for the remainder of the fiscal year in which it could have made all of the cuts necessary to reach the target deficit in Gramm-Rudman if only it had the political will (or perhaps the political won't) to do so.

The fact that Congress chose to rely on Gramm-Rudman rather than the normal legislative process illustrates perfectly what the Act is designed to achieve: deficit reduction without accountability. As Justice Rehnquist observed in *IUD v. API*, it is "difficult to imagine a more obvious example of Congress sim-

ply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." 448 U.S. at 687. "It is the hard choices and not the filling in of the blanks," he continued, "which must be made by the elected representatives of the people. When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process." *Id.*[10]

Second, a fundamental principle of our system of democracy is the need to provide political accountability. When $11.7 billion of cuts became effective on March 1, many people were hurt. But when they looked around for someone to blame, there were no votes, recorded or otherwise, on specific spending reductions. The only legislation that caused these reductions were the votes for Gramm-Rudman, and members could say with some degree of believability that Gramm-Rudman dealt only with the overall need to reduce the deficit, and not specific cuts, and that they had not anticipated reductions of this magnitude in the programs affecting their constituents.

But even if the present Congress can be held accountable for this year's spending reductions, in January 1987 there will be a new Congress, which will truly be able to say that it did not vote even for the Gramm-Rudman process, Moreover, it will be able to assert that it cannot prevent undetermined cuts from going into effect each year because that requires two Houses plus the President to stop the Gramm-Rudman juggernaut by repealing it. Furthermore, the absolute three-fifths vote required in the Senate by section 271 of the Act for waivers of the applicable spending limitation provisions, creates another substantial barrier to altering Gramm-Rudman even for one fiscal year. While Gramm-Rudman does not legally bind future Congresses, it at least creates

[10] On March 20, 1986, Congress reached agreement on H.R. 3128, a version of the reconciliation bill on which it could not agree in December. *See* 132 Cong. Rec. H 1518-26. The measure will result in deficit reductions of $25 billion over three years, $19 billion from lower spending and $6 billion from added revenues. *Id.* at H 1523.

substantial burdens on the legislative process and enables either House or the President to insist upon the spending levels based on Gramm-Rudman, despite whatever else might ensue.

In upholding the delegation, the district court looked to the "necessary and proper" clause of the Constitution, Article I, Section 8, Clause 18. J.A. 45-46. That clause is generally cited as the basis for allowing delegations, *see Lichter v. United States, supra,* 334 U.S. at 757, and under it Congress has been given considerable leeway to decide for itself what is "necessary." But Congress's judgment that a delegation is necessary is not controlling since that clause has another independent requirement: the delegation must also be "proper." As far back as *McCulloch v. Maryland*, 17 U.S. (4 Wh.) 316, 421 (1819), this Court gave the "necessary" aspect of the clause a wide reading, but in doing so noted that "the end [also must] be legitimate" for the law to be valid. Thus, as the Court observed in *Chadha*, "the fact that a given law or procedure is efficient, convenient and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government. . . ." 462 U.S. at 944. Under our system of democracy, it is never proper or "legitimate" for Congress to abdicate its legislative functions in order to achieve a particular substantive end simply because the system for enacting legislation embodied in our Constitution may have frustrated Congress's ability to achieve what it considers to be a desirable goal. As the D.C. Circuit observed about the legislative veto in *Consumer Energy Council of America v. Federal Energy Regulatory Comm'n,* 673 F.2d 425, 476 (1982), *aff'd*, 463 U.S. 1216 (1983):

> To the extent that there is *not* a consensus, the failure to act is not an undesirable "delay" but rather exactly the outcome of the legislative process envisioned by the Framers. The bicameralism and presentation requirements in Article I, Section 7 are not unfortunate by-products of a poorly designed scheme but rather carefully constructed im-

pediments to the Legislature's exercise of power. (Emphasis in original).

This Court need not review the scores of delegation cases which have been decided to reach the conclusion, which no one disputes, that there is no case in which the purpose of making the delegation, and the effect of doing so, was anything remotely like this one. In every other case the delegations were made because, for a variety of reasons, Congress concluded that it could not in any practical sense do the job itself. The contrast is aptly pointed out by this Court's observation in *Bowles v. Willingham, supra*, 321 U.S. at 515-16: "We fail to see how more could be required. . . unless we were to say that Congress rather than the Administrator should determine the exact rentals which Mrs. Willingham might exact." Since that prototypical delegation case is so far from this one, the district court was fundamentally in error in treating them identically. In our view, this motive of avoiding political responsibility alone is enough to set aside the delegation. At least the presence of this kind of motive should cause the Court to scrutinize this delegation with far greater care than in the ordinary case. And, as we shall now show, the delegation here is much too broad and much too imprecise to be upheld whatever the standard of review.

B. Based On All Of The Relevant Factors, The Delegation Under The Act Is Excessive.

Quite apart from the absence of any legitimate necessity for the delegation at issue here, the trigger mechanism must fall under the traditional standards because it is not sufficiently confined to pass constitutional muster. As Judge Leventhal observed for a unanimous three-judge court in *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F. Supp. 737, 745 (D.D.C. 1971)("*Meat Cutters*"), there is "no analytic difference, no difference in kind, between the legislative function—or prescribing rules for the future—that is exercised by the legislature or by the agency implementing the authority con-

ferred by the legislature. The problem is one of limits." For the reasons set forth below, we believe that the proper limits have been exceeded, but before turning to that discussion, one other introductory point is in order.

As we read the cases, there is no single factor that is dispositive, and a proper analysis requires the Court to consider all of the factors, taken as a whole, in deciding whether a particular delegation is excessive. *See Meat Cutters, supra,* 337 F. Supp. at 745, reviewing "several interrelated considerations. . . ." While the district court nodded in the direction of deciding the issue by examining the "aggregate effect" of the relevant factors (J.A. 54), its analysis considered each factor on its own and, if found to be less severe than in other statutes where a delegation was upheld, dropped it from the constitutional calculus. We believe that such a "divide and conquer" approach is not only unwarranted under the case law, but is particularly inappropriate here because of the delegation's improper purpose.

1. *Subject Matter of Delegated Authority*

In one of the earliest cases dealing with the issue of delegated authority, this Court suggested that there are some areas which are so central to the legislative function that they may not be delegated: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wh.) 1, 43 (1825) (Marshall, C.J.). At issue in this case is not simply a general exercise of lawmaking authority under such powers as the Commerce Clause. Rather, Congress is purporting to delegate an authority explicitly limited to it in Article I, Section 9, Clause 7 of the Constitution: "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . ." We do not suggest that there can be no delegations involving the power of the purse that do not run afoul of the undue delegation doc-

trine, but the fact that the power involves a core function of Congress should cause the Court to review the delegation with greater concern than it might where the function was not one assigned to Congress, as opposed to another branch of the federal government.

Furthermore, this is not a situation as in *J.W. Hampton Jr. & Co. v. United States*, 276 U.S. 394 (1928)("*J.W. Hampton*"), where there were only item-by-item adjustments to be made. The delegation here goes to the heart of the appropriations function by allowing across-the-board spending levels, for virtually the entire federal government, to be set by administrators not legislators. If the Constitution does not require the Congress to vote on basic spending decisions, there are no congressional powers for which this factor is relevant.[11]

Furthermore, while the result of other delegations has been to alter existing laws, no statute has ever attempted to override laws to be passed by Congress in the future, based solely on the operation of delegated authority. But in this case, the continuing resolution which was passed seven days after Gramm-Rudman became law, as well as every other spending provision for fiscal 1986, both prior to and subsequent to December 12, 1985, were overridden based on the administrative determination that the budget target has not been met. This is precisely the kind of action, short of full legislation, which this Court condemned in *Chadha* because it "had the purpose and effect of altering the legal rights, duties, and relations of persons. . . outside the Legislative Branch." 462 U.S. at 952. As the *Chadha* opinion further stated in relation to the legislative veto, in language applicable to this Act as well, its "legislative character. . . is confirmed by the character of the congressional action it supplants"

[11] The district court found this point irrelevant (J.A. 43-44), relying in part on this Court's decision in *District of Columbia v. Thompson Co.*, 346 U.S. 100 (1953), which upheld a delegation to the District of Columbia even though the Constitution gives Congress the "exclusive" authority to legislate regarding the seat of government. *Id.*, n.10. But as that opinion makes clear, the Framers included the word "exclusive" primarily to preclude an argument that the states ceding jurisdiction over the land would maintain concurrent jurisdiction over it, not to prevent Congress from delegating the power to another body created by it. *Id.* at 109-10.

(*id.*), which in this case is subsequent and prior spending legislation duly authorized by Congress and signed by the President. No case of which we are aware has ever approved the authority to nullify future legislation, based solely on an administrative determination, let alone allowed it for so central a legislative function as the power of the purse.

2. *Range of Choice*

The closest case in terms of subject matter, because it dealt with the power to tax, is *J.W. Hampton, supra*. However, the effect of the delegated authority there was quite limited since the Secretary was only given the authority to increase the import duty by 50% above that set by statute, *i.e.*, from four to six cents per unit. By way of contrast, in this case there are billions of dollars at stake, limited only by the deficit targets in the Act. But even that limitation is more illusory than real. This can be gleaned from the conference report on the concurrent budget resolution for fiscal 1986 which contains revenue estimates for fiscal years 1986, 1987, and 1988 of $795.7, $869.4, and $960.1 billion respectively. H.R. Rep. No. 99-249, 99th Cong., 1st Sess. 5 (1985). The target deficits in Gramm-Rudman are based on an assumption that approximately those revenues will be realized, but it is plain that if they are substantially off in either direction, Congress's 1985 estimates of how much deficit reduction will be needed each year will be nearly worthless. Moreover, Gramm-Rudman contains no authority to increase revenues, but simply mandates spending reductions as the sole cure to reduce the deficit. Thus, if the administrative process produces revenue estimates which are substantially different from those made last year, the required reductions will be very different from those now projected.

These changes are particularly important in light of the fact that major items, such as Social Security and interest on the national debt, are wholly excluded from the Act. Therefore, any significant reduction in anticipated revenues would produce disastrous results on a percentage, as well as absolute dollar basis, for the programs which are subject to Gramm-Rudman.

Accordingly, because the projections of the amount of deficit reductions that Congress envisioned may be substantially off the mark, the administrators of this Act have the power to produce far greater reductions than Congress ever expected, depending on how they do their estimating. Furthermore, because of the $10 billion "cushion" built into section 251(a)(1)(B) before any cuts are made, a minor alteration in the deficit estimate from one just below that figure to one just above it, can unleash the entire $10 billion in spending cuts. Thus, the incredible sweep of the effect of this delegation is also a factor that weighs heavily against the validity of the statute.[12]

3. *Nature of Decisions to be Made by the Administrator*

In *J.W. Hampton* and many other cases, the courts have sustained delegations by pointing to the essentially factual nature of the decision, *i.e.*, that it is something subject to verification, or at least on which a reasonable consensus exists. We recognize that in *Yakus v. United States, supra*, 321 U.S. at 425, this Court upheld a delegation that called for "the exercise of judgment, and for the formulation of subsidiary administrative policy within the prescribed statutory framework." Nonetheless, the difference between the determinations to be made here and those in the cases in which delegations have been upheld is not one of degree, but of kind, since what must be done under this Act is, in essence, to predict what the economy will look like in the future, not to describe how it performed in the past, or even how it is performing now.

In order to estimate the budget deficit, the following predictions must be made: What will the gross national product be for

[12] The legislative history of the Act contains several striking examples of how far off deficit estimates can be. In 1981, the deficit projection leaped from $60 billion to $140 billion in about two weeks. *See* 131 Cong. Reg. S 12568 (Oct. 3, 1985, remarks of Senator Gramm). In 1985, in 60 days, there was an increase of $20-30 billion in the deficit from the predicted level of $171.9 billion. *Id.* at S 12571, remarks of Senator Rudman. Indeed, Senator Rudman was frank to concede that he was unable to provide "a worst case scenario. It would be almost impossible." 131 Cong. Rec. S 12707 (Oct. 5, 1985).

the forthcoming fiscal year? How much money will be raised from taxes and other sources? What will the inflation rate be? How will interest rates affect the unchanged obligation to pay for the national debt? As the President's own budget admits, these are not questions with answers on which even experts can agree. *See* pp. 8-9, *supra*. In part they depend on how optimistic or pessimistic the forecaster is, or on how likely he believes the present policies of the Administration are to succeed. They are the kinds of judgments that the President and Congress are supposed to make every year in hammering out a budget, and are political in the best sense of the word.

Indeed, it was precisely because the House recognized that these estimates are so subject to political manipulation that it initially gave the decisional authority to CBO, with OMB playing only a consultant's role. 131 Cong. Rec. H 9597 (Nov. 1, 1985, remarks of Rep. Rostenkowski); *accord* GAO Br. at 39. It was only willing to allow OMB and CBO to have equal roles if GAO, which is independent of OMB, became the final arbiter of their differences. Even then Congress insisted that there be a joint report by OMB and CBO, and that in the event of their almost inevitable differences, the final figure would be the average of their initial estimates. *See* section 251(a)(5). This too is powerful evidence that the judgments to be made are inherently imprecise and virtually open-ended in nature, and therefore, any notion that these decisions are "something for a guy with a green eye shade" (Transcript of district court argument ("Tr.") at 72), is simply mistaken. This alone may not be sufficient to bring down the Act, but it is surely a major factor that must be considered by the Court in assessing the propriety of the delegation.

4. *Standards Imposed by Congress*

In defending the statute below, appellants argued, and the district court agreed, that there were adequate standards in the Act for determining whether each year's budget deficit will meet the target in the Act. As support, they pointed to section 251(a)(6), which describes how the budget base will be deter-

mined. Appellees agree that, while that provision answers a number of questions, almost all of the guidance concerns assumptions about which legislative proposal to utilize in the event that Congress has not completed work on the forthcoming year's appropriations bills, or how to deal with specific contingencies when there are clear alternatives. That section does not, however, provide any guidance on the decisive questions about what economic and political assumptions should be used in estimating both revenues and expenditures. In short, section 251(a)(6) is no more help in answering this question than would be the case if a pupil were asked to convert a fraction to a decimal, and the teacher provided only the numerator and not the denominator.

Looking to the remainder of the Act, the crucial determinations are not mentioned specifically, let alone are there any standards included by which adherence to the congressional will can be ascertained. There is here, in the words of this Court in *Panama Refining Co. v. Ryan, supra*, 293 U.S. at 415, "no criterion to govern the President's course." Indeed, the statute does not even tell the administrators what kinds of determinations must be made, other than to subtract from the anticipated deficit the target amount specified in the statute. Nor does the Conference Report fill that void in its discussion of the issue (pp. 81-82). And our reading of the other principal source of legislative history—the nine days of debate on the Senate floor in September and October—found nothing further to illuminate the matter. Nor is this a case, like *American Power & Light Co. v. SEC, supra*, relied on by the district court (J.A. 50), in which the broad words of the Act were given meaning by the purpose of the Act, the context in which the terms are used, and the requirements that are imposed on the agency. By way of contrast, there is a plethora of detail on which programs should be excluded, and how to calculate and allocate the various spending reductions that will take place, but nothing about how Congress wanted these officials to predict the future of the economy. In order to find out what the Directors are to do, it is necessary to review the budget and its back-up documents to see precisely

what must be determined in order to come up with the final deficit figure. And in doing so, it is necessary to make a substantial number of subsidiary estimates, and, as to those, there is absolutely nothing in the Act that prevents the Directors from assuming virtually, if not actually, anything they want regarding the operation of this law and the forces that will bear on the economy in the forthcoming fiscal year.[13]

5. *Length of Delegation*

This Court has also been willing, in emergencies, to allow Congress to delegate short-term powers to the executive when there was a "grave national crisis with which Congress was confronted." *Schechter Poultry, supra,* 295 U.S. at 528. The Court also recognized, however, that "[e]xtraordinary conditions do not create or enlarge constitutional power." *Id.* The reason for that was clearly enunciated in *Lichter v. United States, supra*, 334 U.S. at 780: "In time of crisis nothing could be more tragic and less expressive of the intent of the people than so to construe their Constitution that by its own terms it would substantially hinder rather than help them in defending their national safety."

The fact that a delegation was for a short time was one of the factors cited by Judge Leventhal in upholding the statute in *Meat Cutters, supra*, 337 F. Supp. at 754. There, the initial delegation had been for six months, and, with two extensions, had been extended to a total of less than ten months; in addition, the court observed, "Congress established a 'close control'" through its short-term delegations which required "an affirmative review without prolonged delay, without the option of acquiescence by inaction." *Id.* By way of contrast, the delegation here is for six

[13] It is also worthy of note that there will be no public participation whatsoever in these vital determinations. Indeed, CBO Director Penner predicted that these estimates, which were formerly obtained through an open process, would have to be done in secret because of the serious impact that they would have. House Hearings at 180. As a result, the process may create another objection to this delegation based on the observation of Chief Justice Taft in *Wichita Railroad & Light Co. v. Public Utilities Comm'n*, 260 U.S. 48, 59 (1922), that the Constitution may well require that a delegation be accompanied by "a certain course of procedure and certain rules of decision in the performance of its function."

fiscal years, and the whole purpose of the law is to *preclude* Congress from regularly revisiting the issue in order to insure that congressional inaction will still result in deficits that meet the levels set forth in the Act. Thus, the length of the delegation further weighs against upholding it.[14]

6. *Absence of Judicial Review*

There is no case of which we are aware in which a delegated power remotely resembling this has not been subject to judicial review. Indeed, as recently as 1983, in discussing the issue of delegation, this Court observed in *Chadha* that delegated power "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authorization entirely." 462 U.S. at 953-54, n.16. Here, section 274(h) explicitly forbids both judicial and administrative review of any kind over the fundamental determinations which trigger the operation of the sequestration order. This denial of judicial review is important for two separate reasons.[15]

First, the absence of judicial review underscores the essentially legislative nature of these delegated decisions. Without judicial review these determinations are precisely parallel to those for ordinary congressionally enacted budget decisions. The courts are plainly in no position to decide whether Congress's projections of income and expenses are reasonable, whether the projected inflation rate is appropriate, whether revenue estimates are excessively optimistic or pessimistic, or whether the rate of interest will in fact be as predicted. In other words, the denial of judicial review here further emphasizes that the

[14] At least in the area of military appropriations, the Framers thought that regular review was essential since it limited such appropriations to two years in Article I, Section 8, Clause 12.

[15] The district court correctly noted that section 274(h) does not preclude all review. J.A. 52. However, the fact that the application of a sequestration order to Social Security, for example, could be challenged on the ground that the statute excludes that program from the Act does not alter the fact that the amount of, or indeed even the necessity for, a given sequestration order is entirely committed to the discretion of three unelected officials.

key determinations under the Act are legislative or even political, but surely very different from the kind ordinarily made by administrative agencies. And the fact that other statutes cited by the district court (J.A. 53), have been construed to preclude judicial review over other agency decisions, is immaterial since none of the delegations in those cases approached the magnitude of this one.

Second, the result of a denial of judicial review here is to grant unelected officials uncontrolled discretion, without accountability or any checks and balances. The ordinary legislative process is, as described by this Court in *Chadha*, one that is "exercised in accord with a single, finely wrought and exhaustively considered, procedure" involving two Houses plus the President. 462 U.S. at 951. Because of that balanced consideration, judicial review of legislative determinations is extremely narrow, available only based on a claim that the law violates some specific guarantee under the Constitution. The kind of balanced consideration produced in the legislative process is plainly lacking here, not only because of the extraordinarily short time in which these determinations are to be made, but also because they are not made by elected lawmakers, but by appointed officials who are unaccountable to the public.

Beyond its role as a partial surrogate for the need for a balanced determination, judicial review prevents the kind of uncontrolled discretion which has been anathema even to those who support the concept of broad delegations to administrative agencies: "Even though procedural safeguards cannot validate an unconstitutional delegation, they do furnish protection against an arbitrary use of properly delegated authority." *United States v. Rock Royal Cooperative*, 347 U.S. 533, 576 (1939). Similarly, the court in *Meat Cutters* emphasized the importance of judicial review on no fewer than five separate occasions. *See* 337 F. Supp. at 746, 755, 757, 759 (2 notations). And, as Justice Rehnquist remarked in *IUD v. API, supra*, "courts charged with reviewing the exercise of delegated legislative authority will be able to test that exercise against ascertainable standards," 448 U.S. at 686, a requirement plainly not met here.

In the same vein, the Court in *Yakus v. United States, supra*, 321 U.S. at 425, observed that the courts are needed to "ascertain whether the will of Congress has been obeyed. . . and whether [the agency] has kept within it in compliance with the legislative will." And in sustaining a broad delegation under the Renegotiation Act, this Court in *Lichter v. United States, supra*, underscored that the "provisions for a redetermination of excess profits by the Tax Court de novo. . . imposed important limitations on the allowable recoveries [by the government]." 334 U.S. at 787. Here, the preclusion of any form of administrative or judicial review of the determinations which will trigger massive budget cuts results in essentially unlimited delegation, which cannot be upheld consistent with the cases that have required judicial review as a necessary check on unbridled administrative discretion.

* * *

If the delegation in this case is upheld, the situation will approach that envisioned by the Court in *Panama Refining Co., supra:* "[i]nstead of performing its law-making function the Congress could at will and as to such subjects as it chooses transfer that function to the President or other officer or to an administrative body. The question is not of the intrinsic importance of the particular statute before us [although that is surely a major factor in this case], but of the constitutional processes of legislation which are an essential part of our system of government." 293 U.S. at 430. Henceforth, Congress could adopt the same approach in the tax laws and allow the Secretary of Treasury to determine how much particular taxes or benefits shall be raised or lowered.[16] Indeed, it could adopt this approach in regulatory statutes, allowing the estimate of the future gross national product to alter the question of whether costs are a

[16] Apparently, the Act's sponsors considered bringing in taxes as well, but decided against doing so because of a fear of a Presidential veto. *See* 131 Cong. Rec. S. 12713-14 (Oct. 5, 1985) (colloquy between Senators Rudman and Mitchell).

legitimate matter of concern for regulators, permitting them when the gross national product decreases, and denying them or allowing them to be considered to a greater degree, when the contrary is the case. Such requirements could apply to rules for civil rights, occupational health, and the environment, as well as to the more traditional economic regulatory fields such as railroad, bus, and trucking rates.

Indeed, if this delegation is allowed, Congress could put the entire government on automatic pilot, subject to the expert estimations of unelected officials, without any possibility of judicial review. As CBO Director Penner observed in surveying these powers, even before judicial review was excluded, "[i]t is hard to think of other instances where unelected officials have such power to do good or evil." House Hearings at 157. There are, we submit, substantial limitations on the responsibilities that Congress may delegate short of those that were overturned in *Schechter.* Even if arguments of convenience and efficiency were constitutionally permissible, as *Chadha* makes clear they are not, 462 U.S. at 944-46, this delegation is invalid as an example of a "convenient shortcut," which our Founding Fathers concluded cannot be used consistent with our principles of democratic government. *Id.* at 958. The doctrine of undue delegation remains a valid constitutional principle, and the delegation in this case—which is in fact a legislative abdication of the power of the purse—has far exceeded the permissible limitations imposed by Article I and therefore must be set aside.

II. THE SUBSTANTIVE ROLE OF CBO IN THE DEFICIT REDUCTION PROCESS VIOLATES SEPARATION OF POWERS.

The previous argument assumes that the delegation was made to an agency of the executive branch. All parties agree that, under *Buckley v. Valeo*, 424 U.S. 1, 118-43 (1976), the delegated functions under this Act may not be assigned to an official who is controlled by the legislative branch. The district court found that the delegation to the Comptroller General

violated principles of separation of powers because the Comptroller General is subject to the influence of Congress and thus cannot constitutionally perform his duties under the Act. For the reasons set forth in the briefs of NTEU and the United States and the opinion below, we support that ruling. However, this Court need not decide the status of the Comptroller General to find that separation of powers has been violated. Thus, even though the final report to the President is signed by the Comptroller General, the substantial statutory role that CBO, an acknowledged arm of Congress, has in making the essential decisions contained in that report results in an unconstitutional attempt by the legislature to share in the administration of the Act, which the limited role of the Comptroller General cannot cure.

In a footnote (J.A. 55, n.18) the district court dismissed the argument that the involvement of the CBO amounted to an improper sharing in the administration of the Act by a legislative official. In their memorandum below, the congressional appellees had argued that, under the structure of the Act, the Comptroller General would be no more than a rubber stamp, and that, even if he did more, the role of the CBO was so substantial that an improper "sharing" of functions resulted, of the kind condemned by this Court in *Chadha*. 462 U.S. at 958. In light of the affidavit submitted by the Comptroller General, in which he detailed the close working relationship between GAO and CBO under the Act (*see* p. 13, *supra*), plaintiffs pressed their "shared administration" rather than their "rubber stamp" contention at oral argument (Tr. 31-34). However, the district court ruled only on the latter claim, which it found "unconvincing," although agreeing that, if factually true, it would render the Act unconstitutional.

Appellants seek to defend the involvement of CBO by referring to its role as "advisory." Senate Br. at 40; House Br. at 6; GAO Br. at 40; *see also* District Court Mem. of United States, Jan. 8, 1986, at 32, n.10. But as we now demonstrate, the realities of the decision-making process required under the Act, as confirmed by the Comptroller General's own affidavit, make it clear that CBO's role is far from purely advisory, and therefore it renders the trigger mechanism unconstitutional.

In assessing the role of CBO, it is useful to recall that the original bill passed by the Senate gave the Directors of OMB and CBO the dual authority to make the operative determinations under the Act. As CBO Director Penner advised Congress at the time, the Act "would significantly change CBO's role by endowing it with powers far beyond anything envisioned when the institution was created." House Hearings at 156. No one seriously questions that under *Buckley* and *Chadha* the CBO-OMB trigger mechanism would be unconstitutional, as would the version passed by the House on November 1, 1985, which gave sole decisional responsibility to CBO, subject only to a duty to consult with OMB. *See* 131 Cong. Rec. H 9590, § 251(a)(3). In response to the House's version, the Senate added the Comptroller General on top of CBO and OMB in an effort to save the statute's constitutionality. *See* 131 Cong. Rec. S 14911 (Nov. 6, 1985, remarks of Senator Gramm). The question thus becomes, did the addition of the Comptroller General sufficiently alter the decisional process that it changed an unconstitutional scheme into a constitutional one? In order to answer that question, a brief review of the duties of CBO, OMB, and GAO in general and under the Act is essential.

Until this Act was passed, the Comptroller General had no responsibility for the budget, whereas both OMB and CBO have had as their major, and in the case of CBO, virtually only, function working on proposed and enacted budgets. Following approval of the concurrent budget resolution in the spring, OMB and CBO review the pending legislative and economic developments as part of their regular duties, and under the Act that review is used to prepare their joint report which is due on August 15.

At that point GAO has its first formal involvement in the process. It then has five days, two of which are holidays in the first two cycles, to review the OMB-CBO report and issue its own report to the President. Based on the statutory deadlines, and the fact that GAO is given no additional resources to take on its new duties, Conf. Rpt. at 84, it could be argued that the Comptroller General is little more than a rubber stamp. But if, based on the

Bowsher affidavit, that characterization cannot be sustained, GAO's extensive cooperation with CBO creates another problem—a sharing of administrative functions with an arm of Congress. And, more importantly, it seriously undercuts any claim that adding GAO to the process saved the Act by transforming the role of CBO (and by necessary implication that of OMB) into that of a mere adviser.

Further proof that Congress did not intend the OMB-CBO report to be merely advisory is contained in the standard of review which Congress imposed on GAO in section 251(b)(1). Thus, the Comptroller General must give "due regard for the data, assumptions, and methodologies" used by the Directors, and if he wishes to make any changes, he must "explain fully" the differences between the two reports. Section 251(b)(2). Similarly, the Conference Report (at 74) confirms that Congress did not intend the OMB-CBO report to be merely advice that GAO was free to accept or reject at will: "The conferees intend that the Comptroller General use the utmost discretion in the exercise of his authority to change from the contents of the report of the Directors." And in the memorandum prepared for members of both Houses in connection with the final floor debates, the OMB-CBO report was described as "in essence" constituting "a draft order." 131 Cong. Rec. S 17386 (Dec. 11, 1985); *id.* at H 11876 (in Dec. 12 edition). This view is entirely consistent with that of Senator Gramm who described the GAO's role to the Senate as the "final arbiter of the figures in the report to the President." 131 Cong. Rec. S 14911 (Nov. 6, 1985). It is also consistent with the memorandum offered on the Senate floor in November which described the amendment adding GAO as follows: "Maintains the present legislation's use of both OMB and CBO as the institutions that develop the sequester percentage, but places responsibility for reporting to the President and the Congress in the Comptroller General." *Id.* at S 14908. While other statements suggest a marginally greater role for GAO, taken as a whole this legislative history demonstrates that CBO and OMB were to continue to be the dominant actors and not, as appellants suggest, merely advisers to GAO.

Finally, the clearest evidence that Congress did not consider OMB and CBO as advisers, and GAO as the sole decider, is contained in the fall-back provisions that apply if the Act is declared unconstitutional. Under section 274(f), the GAO has no role whatsoever in that process; rather, the specially created joint budget committee looks solely at the OMB-CBO report. That approach makes sense only if Congress believed that OMB and CBO would be the principal participants in the process, and not simply advisers to GAO. Indeed, the requirement that their report must contain an average on those matters on which they differ can only be explained as a further recognition of the central, not advisory, role that their report plays in the process. It is thus apparent that the last minute addition of GAO to respond to the constitutional objections to the participation of CBO cannot transform CBO's status into that of a mere adviser.

Furthermore, as a practical matter, whatever comes to GAO will almost certainly have the major imprint of CBO. The report is a joint determination of CBO and OMB, with individual estimates where there are disagreements between them. If the Directors agree, GAO is likely to follow what they propose, especially with the congressional directive requiring an explanation of any changes, and the relative expertises in budget matters of the Directors, on the one hand, and GAO on the other. Undoubtedly, CBO and OMB will try to reach agreement, and their agreement will in turn reflect compromises on both sides. Thus, even though the Comptroller General has the right to overrule their estimates, it is highly unlikely that he will try to do so.[17]

The conclusion is inescapable that the Act creates a sharing of responsibilities, which if permitted to stand, would be contrary to this Court's admonition in *Chadha* that the "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted." 462 U.S. at 951. To permit CBO to participate in this process would be "to expand [Congress's] role

[17] On issues such as interpreting the Act, when OMB and CBO have much less claim to expertise, GAO is more likely to exercise its own judgment, as it in fact did in several instances for fiscal 1986.

from one of oversight with an eye to legislative revision, to one of shared administration [, resulting in an] overall increase in congressional power [which] contravenes the fundamental purpose of the separation of powers doctrine." *Consumer Energy Council of America v. FERC, supra*, 673 F.2d at 474. This effort to give CBO a substantive role is, like the veto, "an attempt by Congress to retain direct control over delegated administrative power" which may not be done consistent with principles of separation of powers. *Id.* at 476.

The final reason why the Court should be particularly reluctant to condone the arrangement as consistent with principles of separation of powers relates to the status of the Comptroller General and the ability of Congress to influence him, at least in a general way, even if not on specific decisions. Beside the fact that the Comptroller General has generally been described as part of the legislative branch or as an agent of Congress (J.A. 71, n.29), there are three principal attributes of his office which provide the basis for the conclusion that he will look to Congress for guidance, if not actual orders. First, although appointed by the President, his name is selected from among three nominees sent to him by Congress. *See* 31 U.S.C. § 703(a)(3). Second, GAO's budget is sent to Congress by the President without change, thus allowing the legislative branch alone to decide on the funds needed for the Comptroller General to carry out his duties. *See* 1986 Budget, pages 5-145, 8-12. Finally, pursuant to 31 U.S.C. § 703(e)(1)(B), the Comptroller General may be removed by a joint resolution of Congress, after notice and an opportunity for a hearing, for any of five separately enumerated reasons, which include the open-ended category of "inefficiency." He may not, however, be removed for any reason by the President, whose only role in the process is either to assent to, or veto, a joint resolution of removal, and in the latter case that decision could be overridden by a two-thirds vote of both Houses.

As the district court concluded (J.A. 75), this cumulative influence by the legislative branch in the business of the GAO is unconstitutional under the "sound application of a principle that makes one master in his own house precludes him from impos-

ing his control on the house of another who is master there." *Humphrey's Executor v. United States*, 295 U.S. 602, 630 (1935). That influence can only be increased by the involvement of CBO in the Gramm-Rudman process, with the inevitable, if subtle, pressure on the Comptroller General to side with CBO in its differences with OMB. Proof of that is not, of course, possible, but neither is proof to the contrary. Indeed, it is precisely because such encroachments are often undetectable that makes insisting upon separation of powers so vital. As this Court observed in *Buckley v. Valeo, supra*, 424 U.S. at 129, ". . . the debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches." Surely, in light of the purpose of the Act, which is to enable Congress to reduce the budget deficit without being politically accountable for cutting popular programs or raising taxes, it would be doubly destructive of democracy to allow Congress to do this through the back door by using its agent, CBO, to influence the supposedly independent determinations of GAO. Because both the structure of the Act and the way that it necessarily operates openly invite such an outcome, the substantial role of CBO contravenes the principles of separation of powers and renders the trigger mechanism unconstitutional.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed and the trigger mechanism in sections 251 and 252 of the Act declared unconstitutional.

Respectfully submitted,

Alan B. Morrison
(Counsel of Record)
Katherine A. Meyer

Public Citizen Litigation Group
Suite 700
2000 P Street, N.W.
Washington, D.C. 20036
(202) 785-3704

Attorneys for Appellees Mike Synar, Member of Congress, *et al.*

April 9, 1986

ADDENDUM
Themes From Gramm-Rudman Floor Debates

1. The Ordinary Legislative Process Has Failed to Reduce the Size of the Deficit.

"This past budget debate showed with excruciating clarity that Congress is incapable of reducing the deficit with the tools it currently has. With our amendment, we are adding some new tools to the toolbox." 131 Cong. Rec. S 12087 (Sept. 25, 1985, remarks of Sen. Zorinsky).

"It is not the greatest way to manage a magnificent country. But we have political gridlock at this point, and the existing processes of our Government, executive and legislative, invite the continuation of the gridlock." 131 Cong. Rec. S 17386 (Dec. 11, 1985, remarks of Sen. Domenici).

"We come to today because there is no other alternative." 131 Cong. Rec. S 17403 (Dec. 11, 1985, remarks of Sen. Rudman).

"A majority cannot be mustered for any single viewpoint and the red ink continues to gush forth." 131 Cong. Rec. S 17432 (Dec. 11, 1985, remarks of Sen. Chafee).

"Mr. President, I was asked this afternoon by a reporter if Gramm-Rudman-Hollings is not a straitjacket. If it is, Mr. President, it is a straitjacket required to restrain a madman from doing irreparable harm to America. Congress is the madman. We have engaged in the madness of unrestrained spending." 131 Cong. Rec. S 17440 (Dec. 11, 1985, remarks of Sen. Wilson).

"Our actions speak louder than our words. It is obvious that Congress is incapable of exercising budgetary restraint. With passage of the Gramm-Rudman bill, I am now hopeful that we can finally begin to solve our serious deficit problem." 131 Cong. Rec. H 11880 (Dec. 11, 1985, remarks of Rep. Barton).

"This bill sets up procedures that a properly functioning legislation [sic] institution should not need. It is a sad reflection on this body that it is unable to establish spending priorities making outlays meet revenues like all American families do every day." 131 Cong. Rec. H 11881 (Dec. 11, 1985, remarks of Rep. Daub).

"The need to do it is a confession on our part that we have not been doing our job." 131 Cong. Rec. H 11882 (Dec. 11, 1985, remarks of Rep. Latta).

"The President out of ideological rigidity has failed to propose responsible budgets. This Congress out of political timidity has refused to adopt responsible budgets and so as a result of that mutual failure, we have Gramm-Rudman." 131 Cong. Rec. H 11887 (Dec. 11, 1985, remarks of Rep. McHugh) (opponent).

"Mr. Speaker, this bill is in a real sense an act of legislative desperation . . . it seeks to place a political straitjacket on both the executive and the legislative branches of Government and force both branches to face unpleasant facts. To the degree that that may be necessary, it is the inevitable result of our fiscal excesses, particularly those of the last five years which have doubled the national debt." 131 Cong. Rec. H 11903 (Dec. 11, 1985, remarks of Rep. Wright, House Majority Leader).

2. As A Result of Public Pressure To Increase Spending, Often from Special Interest Groups, Congress Lacks the Will and Discipline to Vote to Reduce Spending or Increase Taxes.

"It will once and for all remove the politics and the finger pointing from the Federal deficit. It will enable us to cut away the rhetoric and get to the task at hand by providing us with the discipline that we are so sorely lacking to make the budget process work." 131 Cong. Rec. S 12084 (Sept. 25, 1985, remarks of Sen. Hollings).

"... the numbing figure of two trillion dollars... is the most convincing argument that the discipline needed to make the budget process work is simply not there." 131 Cong. Rec. S 12084 (Sept. 25, 1985, remarks of Sen. Hollings).

"Certainly, Congress wields the authority and the means to address the problem. It lacks, however, the resolve to employ them.

"The legislation that my colleagues and I are today introducing would enforce upon the Congress the resolve necessary to bring the Federal budget back into balance." 131 Cong. Rec. S 12088 (Sept. 25, 1985, remarks of Sen. Cohen).

"Time and time again, we take our turn coming to the Senate floor and denouncing the evils of deficit spending and the need for reform. Yet when it comes to making hard choices, we have been unwilling to come to grips with this problem." 131 Cong. Rec. S 12089 (Sept. 25, 1985, remarks of Sen. McClure).

"We got here because of the failure in the process—because of the failure of the President of the United States, in my judgment, to do his duty; because of the failure of the Congress, in my judgment, to do its duty; because of the failure of the people of this country to understand what it is all about. . . . In a word, Mr. President, we got here because the people, the Congress, the President, and the press all want that which never was and never can be. That is, they want a balanced budget without cuts, without pain, without taxes, without taking the blame, without taking the responsibility, without measuring up to those duties of statesmanship which require occasionally that we say 'no' to our most profligate desires to spend and to avoid pain." 131 Cong. Rec. S 17383 (Dec. 11, 1985, remarks of Sen. Johnston) (opponent).

"What we ought to do in Congress, in my judgment, is live up to our Constitutional duty. The duty of this Congress is to raise money and to appropriate money, among other things—that is, to set priorities, to micromanage the budget, to decide what things

are more important and how important and when, and how revenues should be raised and when." 131 Cong. Rec. S 17385 (Dec. 11, 1985, remarks of Sen. Johnston)(opponent).

"It is simply because those consequences are so adverse, not just to defense but to many non-defense programs, that we will finally have the motivation to do the job right up front." 131 Cong. Rec. S 17401 (Dec. 11, 1985, remarks of Sen. Gorton).

". . . the bill is a formal admission that the Congress does not know how to balance the budget; that we simply do not have the guts to make the hard choices to bring our fiscal house into order." 131 Cong. Rec. S 17404 (Dec. 11, 1985, remarks of Sen. Glenn) (opponent).

". . . [the] bill. . . requires us to spend more responsibly, and perhaps induce discipline in spending, without the political consequences that might accrue under the present conditions. In other words, that we might be able to have less temptations against cutting spending." 131 Cong. Rec. S 17411 (Dec. 11, 1985, remarks of Sen. Denton)(opponent solely because of fears of excess defense cutting).

"This simple yet powerful measure will impose on Congress the discipline which we have so amply demonstrated we do not possess." 131 Cong. Rec. H 11880 (Dec. 11, 1985, remarks of Rep. Barton)(not delivered).

"We are in a logjam; everybody acknowledges that. Just listen to the speeches you have heard tonight. We know where the answer is to deal with the deficit. We have got to limit defense spending, we have to limit entitlements and we have to raise revenues to pay the bills. Those three have to be put together if you are really serious about dealing with the deficit. But nobody wants to move; nobody wants to move." 131 Cong. Rec. H 11883 (Dec. 11, 1985, remarks of Rep. Panetta).

"It is an act of desperation, but now is the time to act even if it is in desperation. . . . The system is not working the way it is. This is going to impose a discipline on us that we do not like, but I think it is time for us to impose it on ourselves, because if we do not, there will be no future for this country to defend." 131 Cong. Rec. H 11887 (Dec. 11, 1985, remarks of Rep. Shaw).

3. Gramm-Rudman Was Intended to Create A Mechanism That Will Operate Automatically to Reduce Deficits Even If Congress Fails to Do So By the Ordinary Legislative Process.

"The most important feature of our proposal, Mr. President, is its creation of a mechanism which will automatically institute the budget cuts necessary to achieve the prescribed deficit targets." 131 Cong. Rec. S 12084 (Sept. 25, 1985, remarks of Sen. Rudman).

"The amendment we are offering provides a mechanism which will force Congress simply to live up to its responsibility to reduce the deficit." 131 Cong. Rec. S 12087 (Sept. 25, 1985, remarks of Sen. Zorinsky).

"Its genius is not in the special detail, in the dates by which certain actions must be taken, or in the mechanics of the proposal. Its genius is in its theory. The amendment before us would accomplish this: change profoundly the consequences of a deadlock over budget priorities, and the consequences of inaction. To this point the consequences is deadlocked [sic], the consequences of inaction, have been that budget deficits went on as they did before, growing for all practical purposes on automatic pilot, frustrating the people of the country, choking the economy, and frustrating even the members who vote for them.

"Under Gramm-Rudman-Hollings, if the Members of the Congress of the United States cannot reach their goals, cannot reach the goals of that amendment which would result in a balanced budget by Fiscal Year 1990, through a course of creative compromise, then the amendment's formula will do it for us. . . . After the passage of this amendment the conse-

quences of inaction or of a deadlock will be that we will nonetheless proceed in the direction of a balanced budget and of a stronger economy." 131 Cong. Rec. S 12574 (Oct. 3, 1985, remarks of Sen. Gorton).

"[The concept of Gramm-Rudman] held the promise of forcing some responsibility from both Congress and the President. The concept was simple but forceful: if Congress will not act prudently, then we will impose across-the-board impartial cuts in order to reduce deficits." 131 Cong. Rec. S 17386 (Dec. 11, 1985, remarks of Sen. Domenici).

"It sets up a process, and that process is a disciplining process that requires that across-the-board cuts stand in place if we do not do our jobs." 131 Cong. Rec. S 17389 (Dec. 11, 1985, remarks of Sen. Gramm).

"The Gramm-Rudman-Hollings amendment is akin to the Sword of Damocles with the threat of sequester hanging over us by a thread." 131 Cong. Rec. 17400-01 (Dec. 11, 1985, remarks of Sen. Gorton).

"Mr. President, the legislation which we are passing today is a club over the head of both the President and the Congress designed to force action to reduce the deficit and to produce a balanced budget by 1991." 131 Cong. Rec. S 17420 (Dec. 11, 1985, remarks of Sen. Levin).

"The Founding Fathers never envisioned a government bound by a formula, and yet that is exactly what this conference report would impose on the country. Mr. President, this process represents the most significant abdication of the responsibility of Congress to determine the fiscal priorities of the nation that I have seen in my 33 years on Capitol Hill. My constituents elected me to represent their interests and the national interests, using whatever good judgment I could bring to bear on matters on which we have the vote, and not using some automatic for-

mula." 131 Cong. Rec. 17442 (Dec. 11, 1985, remarks of Sen. Byrd) (opponent).

"Mr. Speaker, the vice of Gramm-Rudman is it confines to a mindless, unfeeling, unthinking, bloodless formula the judgments—the sensitive, hard judgments—that we were elected to make. When we go [to] the voters and we say, 'trust us. We'll exercise our judgment based on our conscience and our experience,' and then we lateral over to a computer the judgments on defense and on so many important issues, that is cowardice, and I cannot buy it." 131 Cong. Rec. H 11885 (Dec. 11, 1985, remarks of Rep. Hyde)(opponent).

"Mr. Speaker, if Webster's could define Gramm-Rudman, it would be something like this: an abdication of congressional responsibility, a loophole through which Congressmen can slide. Mr. Speaker, you cannot legislate political courage." 131 Cong. Rec. H 11889 (Dec. 11, 1985, remarks of Rep. Hartnett) (opponent).

"The fundamental mission of government is to choose among conflicting priorities. Gramm-Rudman abandons this goal by divesting the Congress of all responsibility for making difficult decisions about spending and revenues, preferring to focus on procedures rather than substance." 131 Cong. Rec. H 11892 (Dec. 11, 1985, remarks of Rep. LaFalce)(opponent, not delivered).

(15) (14) (15)

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLEE NATIONAL TREASURY EMPLOYEES UNION

LOIS G. WILLIAMS *
Director of Litigation

GREGORY O'DUDEN
Assistant Director of Litigation

RICHARD S. EDELMAN
ELAINE D. KAPLAN
CARY P. SKLAR
Assistant Counsels

NATIONAL TREASURY
EMPLOYEES UNION
1730 K St., N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411

Counsel for Appellees, National Treasury Employees Union, et al.

* Counsel of Record

April 1986

WILSON - EPE

QUESTIONS PRESENTED

I. Did the court below err in concluding that the budget reduction mechanism in the Balanced Budget and Emergency Deficit Control Act of 1985 was not an unconstitutional delegation of legislative power where:

a) the Act gives unelected officials with the unprecedented power to undo duly enacted appropriations law and to make spending reductions automatically, without congressional approval;

b) the Act was designed to avoid congressional accountability by allowing the federal budget to be balanced in a way that insulated members of Congress from having to vote on specific budget cuts or tax increases;

c) the Act provides no meaningful guidance to its administrators in making required budget deficit forecasts which ultimately determine the spending levels of the entire federal budget; and

d) the Act precludes judicial review of the administrators' pivotal deficit forecasts.

II. Did the court below correctly hold that the Act violates separation of powers principles in assigning a significant executive role to the Comptroller General, an official who is removable by and otherwise answerable only to Congress?

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BRIEF FOR APPELLEE
NATIONAL TREASURY EMPLOYEES UNION

STATEMENT OF THE CASE

At issue in this appeal is the constitutionality of the automatic spending reduction mechanism created by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, commonly known as the Gramm-Rudman Act. Under the Act, the Comptroller General, with the help of the Office of Management and Budget (OMB), and the Congressional Budget Office (CBO), is charged with predicting the magnitude of the budget deficit for the coming fiscal year. A prediction that the deficit will exceed the statutory target automatically triggers reductions in spending levels previously set by duly-enacted legislation.

1. The Gramm-Rudman Act

a. The legislative history of the Gramm-Rudman Act [1] unequivocally reveals that Congress created the automatic spending reduction mechanism because it wanted to reduce the size of the federal budget deficit, but found no consensus to do so under the ordinary budget process.[2] The legislative debates show that Congress was not able to reduce the deficit under the ordinary process because, collectively and individually, its Members would not openly endorse the requisite spending cuts, or tax in-

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[1] The Gramm-Rudman bill, S.1702, was an amendment to H.J. Res. 372, a bill to increase the ceiling on the national debt. There were no Senate hearings, committee mark-ups or reports on the bill. After H.J. Res. 372 passed the Senate, it went to conference. While the bill was in conference, there were hearings on Gramm-Rudman in the House. *See Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Gov't. Operations*, 99th Cong., 1st Sess. (1985) (*"House Hearings"*).

[2] *See, e.g.*, 131 Cong. Rec. S12082 (Sept. 25, 1985) (remarks of Sen. Gramm); 131 Cong. Rec. S12085 (Sept. 25, 1985) (remarks of Sen. Rudman). All references to volume 131 of the Congressional Record are to the daily edition.

creases, for fear of losing the support of any elements of their constituency.[3] As a consequence, while recognizing that the deficit must be reduced, Congress had not been able to agree on the choices necessary to accomplish that result.

Gramm-Rudman was designed as a politically palatable means of balancing the budget. Some Congressmen who supported its passage felt that the spectre of automatic cuts under the Act would compel Congress and the President to make the hard choices they had theretofore shunned.[4] But none would quarrel with the notion that Congress enacted Gramm-Rudman in order to assure that the budget deficit would be reduced, whether or not its Members continued to decline openly to choose between competing interests. Generally, Gramm-Rudman achieves this result by establishing a maximum allowable deficit amount for each fiscal year between 1986 and 1991, and by creating an administrative mechanism to implement those targets automatically, regardless of what spending levels are set by enacted legislation, unless the legislation meets the target. We turn now to a more detailed consideration of the role of this new administrative mechanism in the overall budgetary process.

b. Gramm-Rudman directs the President to submit in January of each year a budget that does not exceed the target deficit for the upcoming fiscal year, which begins the following October. Congressional Budget and Impoundment Act of 1974, 31 U.S.C. 1105(f), as amended by Section 241(b). In order to measure anticipated revenues against anticipated expenditures, and predict the deficit so as to meet the target, the President must, in January, predict the conditions of the economy for the next 21 months through the end of the coming fiscal year. Unpredicted changes in domestic and international

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[3] *See, e.g.*, 131 Cong. Rec. H11887 (Dec. 11, 1985) (remarks of Rep. Jones).

[4] *See, e.g.*, 131 Cong. Rec. S17389 (Dec. 11, 1985) (remarks of Sen. Gramm).

economic conditions during that period will affect, sometimes dramatically, revenues collected, expenditures made, and hence the size of the deficit. The Act contemplates that Congressional action on all appropriations be completed in June.[5]

Although political pressure to fund all programs continues under Gramm-Rudman, the difference is that the individual appropriations measures passed by Congress and signed by the President may be drastically altered to meet the target deficit by administrative action automatically implemented without further congressional or Presidential consideration. Thus, on August 20 each year, the CBO and OMB must issue a report in which they predict what the deficit will be in the next fiscal year, considering all legislation enacted by August 15, the condition of the economy, and their forecast of economic conditions in the upcoming fiscal year. Sections 251(a)(1) and (a)(2); J.A. 109-110. If they predict that the target deficit will be exceeded by 10 billion dollars or more, they must specify in accordance with the Act's requirements which programs must be cut, and to what degree. Sections 251(a)(2) and (a)(3); J.A. 110-114. Because they must issue a single report, the Directors are instructed to "average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction." Section 251(a)(5); J.A. 115.

Within five days after the OMB/CBO report is issued, on August 25, the Comptroller General must review it and issue his own report. Section 251(b); J.A. 116-118. The Comptroller General's deficit prediction, based on his economic forecast, determines whether and to what extent

[5] The Act's timetable contemplates completion of the non-binding concurrent resolution, meeting target deficits by April 15, reconciliation legislation by June 15, and House action on all annual appropriations by June 30. Section 201(b), amending Sections 300 and 301(a) and (i) of the Budget Act. Joint Appendix ("J.A.") at 106-108.

cuts must be made in existing spending levels.[6] Significantly, the economic data, assumptions, and methodology used by the Comptroller General to determine the projected deficit are not subject to judicial review. Section 274(h); J.A. 166.

By September 1, the President must issue a "sequestration" order, carrying out, without change, the cuts specified by the Comptroller General. Section 252(a)(1),(a)(3); J.A. 124-125, 128. This order takes effect unless within one month, by October 1, Congress and the President enact alternative reductions that would result in meeting the target deficit. The Act provides for a second round of reporting by OMB and CBO on October 5, and by the Comptroller General on October 10, to account for changes since August 25. Section 251(c); J.A. 118-119. In accordance with those reports, on October 15, the President issues a final sequestration order, effective immediately. Section 252(b); J.A. 132-134.[7]

c. Congress recognized that the automatic reduction mechanism raised serious constitutional questions concerning the separation of powers. Therefore, it provided for expedited judicial review of the Act's constitutionality as well as a fallback provision, should the automatic mechanism be declared invalid for any reason. Sections 274

[6] The Act requires equal reductions between defense and nondefense programs. Section 251(a)(3)(B); J.A. 110-111. To do this, it first eliminates all automatic cost of living adjustments mandated by Statute, or reduces them to the point where one half the excess deficit, as forecast by the Comptroller General, is eliminated. Section 251(a)(3)(C); J.A. 111. Then the remaining parts of the budget (except for those parts exempted), are to be reduced by a uniform percentage until the target is met. Section 251(a)(3)(F); J.A. 112-114.

[7] The foregoing discussion was based on the deadlines and process the Act imposes for fiscal years 1987 to 1991. The process used for 1986 was the same in principle, with some adjustments to account for the fact that the Act was not signed into law until two months into the fiscal year. The 1986 provision of primary relevance to this case froze cost-of-living adjustments due federal retirees on January 1, 1986. Section 252(a)(6)(C); J.A. 129-130.

(a)-(c), (f); J.A. 162-166. Under the fallback provision, the Comptroller General is eliminated from the deficit reduction process, and the report of OMB and CBO goes instead to a joint budget committee of Congress. The budget committee reports its contents to both Houses which then consider the matter on an expedited basis. The cuts specified in the report will go into effect, like any other legislation, only if both Houses and the President concur (or if the President's veto is overridden). Section 274(f); J.A. 165-166.

2. Proceedings Below

a. The 9,000 retiree/members of the National Treasury Employees Union ("NTEU" or "the Union") were among the first persons injured by the Act, alleging that the automatic trigger is unconstitutional, and that the cost-of-living adjustment frozen on Jan. 1, 1986, should be fully restored. NTEU filed suit on December 31, 1985, to challenge the constitutionality of the automatic reduction mechanism. J.A. 13-15. Its suit was consolidated with an action filed by Representative Mike Synar and eleven other Congressmen. The Senate, the House Bipartisan Leadership Group, and the Comptroller General intervened in defense of the statute.

In the court below, the United States (the nominal defendant) unsuccessfully challenged the Congressmen's standing to maintain the suit. J.A. 30-31, 36-38. All parties agreed, however, and the Court ruled, that NTEU had standing to assert the rights of its retiree/members, whose cost of living adjustments for 1986 were eliminated. *Id.* at 31, 34-36.

b. In the court below, plaintiffs argued that the Act's automatic spending reduction mechanism violates the Constitutional provision vesting all legislative power in Congress. NTEU explained that in this Act, Congress and the President have abdicated their constitutional duty to legislate the nation's spending priorities, and that the Act impermissibly and in unprecedented fashion delegates legislative authority to various unelected administrative officials, whose decisions and methods are ex-

plicitly insulated from judicial review. Further, plaintiffs contended that, to the extent Congress could delegate any authority here, it may not delegate it to the CBO, a congressional agency, or the Comptroller General, an official who is removable by Congress.

c. The district court ruled that the automatic spending reduction mechanism violates the separation of powers doctrine on the second ground plaintiffs advanced. J.A. 55-80. The court rejected plaintiffs' arguments that the enormous and unguided authority the Act gives to OMB, CBO, and the Comptroller General to alter existing legislation, on the basis of unguided and unreviewable determinations and methodologies, violates the constitutional provision that vests all legislative power in Congress. *Id.* at 38-55.

However, the court ruled that the role of the Comptroller General in the spending reduction mechanism violated separation of powers principles. The court concluded that the powers the Act confers upon the Comptroller General are executive in nature and that the Comptroller General cannot, consistent with the separation of powers doctrine, exercise such executive powers because he is removable by and thus beholden to Congress. *Id.* at 71-78.

Relying on precedents of this Court, the district court rejected the intervenors' contentions that the constitutionality of the Comptroller General's role in the automatic reduction process was not ripe for review, holding that Congress' removal power creates a "here-and-now subservience" of the Comptroller General to Congress. J.A. 57. The court also rejected intervenors' suggestion that if the powers granted to the Comptroller General under the Act cannot be assigned to an officer removable by Congress, then the 1921 statute that makes him so removable, not the 1985 grant of powers, should be stricken. J.A. 59-61.

Thus, the district court declared the automatic deficit reduction mechanism unconstitutional, and the Presiden-

tial sequestration order issued February 1, 1986, without legal force and effect.

SUMMARY OF ARGUMENT

1. The automatic deficit reduction mechanism is an overbroad delegation of legislative power to the Act's administrators. The automatic mechanism cannot be constitutionally sanctioned for several reasons. First, that mechanism would directly undermine a central principle of the delegation doctrine: that fundamental policy decisions, such as those required to establish a balanced federal budget, are to be made by accountable elected officials. In violation of this principle, the Act transfers to its unelected administrators the responsibility for determining whether spending levels in duly considered appropriations laws will be reduced, and to what extent, and it allows these administrative determinations to take effect automatically. As the legislative debates reveal, Congress devised the automatic reduction scheme not for reasons of governmental necessity but for reasons of political expediency. The automatic mechanism permits attainment of a balanced budget but in a way that insulates members of Congress from making the hard—and unpopular—choices which are needed to reach that goal.

Second, the key principle of accountability is further undercut because, in making its unprecedented, wide-ranging delegation of power to the Act's administrators, Congress provided no meaningful standards to guide them in the making of pivotal budget deficit estimates. Such deficit estimates are highly speculative and yet they ultimately decide whether, and in what amounts, spending must be cut to meet the Act's deficit targets. Finally, the uncontained nature of the delegation made by the Act is further underscored by its total preclusion of judicial review of the crucial deficit projections that trigger the automatic reduction mechanism.

2. The Act is administered by the Comptroller General, in coordination with the Congressional Budget Office and the Office of Management and Budget. Because

the Comptroller General may be removed by and is beholden to Congress, he may not constitutionally exercise the executive power assigned to him by the Act. The congressional power to remove the Comptroller General, coupled with the lack of any counterbalancing power on the part of the President, ensures the Comptroller General's fealty to Congress. The legislature thus retains an influence over administration of the Act that violates separation of powers principles. The court below correctly discerned that "here and now subservience" to Congress is guaranteed by the potent power of removal.

Finally, this Court should decline appellants' invitation to strike this removal provision if it concludes that the powers assigned by the Act to the Comptroller General cannot be conferred upon an officer removable by Congress. On the basis of this Court's precedents, the district court correctly determined that the path of eliminating the removal provision was not open to it. The court also rightly concluded that, even if it had such an option, it should be rejected given the Act's legislative history, its inclusion of a specific fallback deficit reduction provision, and the uncertain consequences of striking the removal provision upon the Comptroller General's duties under other statutes.

ARGUMENT

THE ACT'S AUTOMATIC DEFICIT REDUCTION PROCESS IS UNCONSTITUTIONAL.

INTRODUCTION

The Union contends that the Act's automatic spending reduction provisions are constitutionally defective because they mark an overbroad delegation of legislative power. This case presents the fundamental question of whether Congress can constitutionally create a statutory mechanism that transfers to unelected administrators the power to determine federal budget reductions where: (1) the magnitude of those reductions is based on the administrators' economic forecasts, the making of which is unguided by any meaningful standards; and (2) the re-

ductions override duly enacted appropriations and occur automatically without approval by any elected officials.

We urge that such a mechanism is constitutionally impermissible because the Act, at bottom, represents a congressional effort to avoid making the hard choices that all acknowledge must be made in order to meet the declared objective of balancing the federal budget. Congress, in this Act, sought to insulate itself from having to specify the requisite, but politically unpopular, spending determinations, and instead assigned the task of deciding whether spending reductions would take place, and in what amounts, to the Act's administrators. Under the Act's scheme, the administrators' determinations can take effect automatically without any Presidential review or affirming congressional action. We believe that this scheme cannot stand because it frustrates—by design—the primary purpose of the delegation doctrine: to assure that fundamental policy decisions, such as the setting of spending levels for the federal government, will be made by accountable, elected representatives.

We alternatively maintain that, assuming Congress may delegate budget-cutting responsibilities, the way it has chosen to do so is constitutionally defective. The district court correctly concluded that the Act's assignment of administrative responsibilities to the Comptroller General, an official removable by and thus beholden to Congress, violates well established principles of separation of powers.

I. THE AUTOMATIC DEFICIT REDUCTION PROCESS CONSTITUTES AN UNCONSTITUTIONAL DELEGATION OF CONGRESS' RESPONSIBILITY TO SET SPENDING LEVELS.

A. The Governing Principles of the Delegation Doctrine Underscore that Fundamental Policy Choices, Such as Those Required to Establish the Contours of Federal Spending, Must Be Made by Congress and Not by Unelected Officials.

As the district court observed, the delegation doctrine derives from the principle of separation of powers that

underlies our three-branch system of government. J.A. 39. This Court has instructed that this principle is breached where "Congress gives up its legislative power and transfers it . . ." to the executive branch. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 406 (1928). More recently, the Court has reaffirmed that separation of powers "was not simply an abstract generalization in the minds of the Framers" (*INS* v. *Chadha*, 462 U.S. 919, 946 (1983), *quoting Buckley* v. *Valeo*, 424 U.S. 1, 124 (1976)), but a vital restraint designed to ensure that "the carefully defined limits on the power of each Branch must not be eroded." *INS* v. *Chadha*, 462 U.S. at 958.

We believe that, in this Act, Congress unquestionably overstepped its authority and breached the separation of powers principle. As we show, the Act confers on its administrators "such a breadth of authorized action" that it ultimately surrenders to them "the functions of a Legislature . . ." *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 418 (1935). The abdication of legislative power found in the Act cannot be squared with "the profound conviction of the framers that the powers conferred on Congress were the powers to be most carefully circumscribed." *INS* v. *Chadha*, 462 U.S. at 947.

Article I of the Constitution vests "[a]ll legislative powers . . . in a Congress . . . which shall consist of a Senate and House of Representatives" and declares that Congress is "[t]o *make all laws* which shall be necessary and proper." U.S. Constitution art. I, sections 1, 8 (emphasis added). In addition, and of particular relevance for this case, Article I stipulates that "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." *Id.*, sec. 9, cl. 7. This Court long ago recognized that Article I imposes a limit on Congress' ability to delegate its law-making power to the other branches of government: "That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by

the constitution." *Field* v. *Clark,* 143 U.S. 649, 692 (1892). Implicit in this limiting principle was a recognition that unchecked transfers of legislative power would insulate the legislature from accountability to the electorate and thus thwart the Constitution's design that laws are to be democratically considered in accord with a "finely wrought and exhaustively considered, procedure." *INS* v. *Chadha,* 462 U.S. at 951.

While the admonition against undue delegation has been frequently iterated, the principle has seldom been held to be breached. As the district court observed, there are only two cases, *A.L.A. Schechter Poultry Corp.* v. *United States,* 295 U.S. 495 (1935), and *Panama Refining Co.* v. *Ryan, supra,* in which the Court declared statutes unconstitutional because of overbroad delegations.

It is clear, however, that while no statute has lately been voided because of delegation defects, the principles of the doctrine continue to be instrumental. *See, e.g., National Cable Television Association* v. *United States,* 415 U.S. 336 (1974), and *Kent* v. *Dulles,* 357 U.S. 116 (1958) (where the Court invoked the delegation doctrine to read a statute narrowly and thus avoid the constitutional question).

Although the Court has taken various approaches in saving numerous statutes from challenges of excessive delegation, no simple test for overbroad delegation has emerged.

The salient considerations underlying the delegation doctrine were perhaps most aptly stated by Justice Harlan in an often-cited dissenting opinion in *Arizona* v. *California,* 373 U.S. 546 (1963). Justice Harlan explained that the doctrine serves two primary functions, of especial relevance here, which are essential to the Constitution's separation of powers scheme:

> *First,* it insures that the fundamental policy decisions in our society will be made not by an appointed official but by the body immediately responsible to

> the people. *Second*, it prevents judicial review from becoming merely an exercise at large by providing the courts with some measure against which to judge the official action that has been challenged.

Id. at 626. When viewed against the backdrop of the doctrine's animating principle of accountability, this Court's decisions provide a useful focus, and reveal why this Act exceeds the limit of lawful delegation.

First, and most fundamental, is the requirement that Congress genuinely exercise the "essentials of the legislative function" by making the basic policy decisions and formulating a rule of conduct to effectuate its policy devices. *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). Embodied in this factor is the overarching principle that the "[f]ormulation of policy is a legislature's primary responsibility, entrusted to it by the electorate . . ." *United States* v. *Robel*, 389 U.S. 258, 276 (1967) (Brennan, J., concurring). The inquiry mandated is aimed at ensuring that Congress make the so-called hard choices; it instructs that Congress' "policy-making function" is not to be passed on to those not "answerable or responsive in the same degree to the people." *Ibid.*

Second, and consonant with the doctrine's objective of ensuring accountability, is the requirement that the statute provide sufficient standards to guide the exercise of delegated power. The statute must provide an "intelligible principle" which can be discerned and followed by the delegate. *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. at 409. While obviously connected to the ultimate question of whether Congress has sufficiently exercised its legislative power, the "sufficient standards" requirement shifts the focus to whether Congress has provided enough policy guidance to administrators that its will can be followed. *Yakus*, 321 U.S. at 424-425.

Third, the Court must assess the role of so-called governmental necessity. The Court has recognized the "necessity" for increasingly broad congressional delegation, under the rationale that certain decisions may be delegated to administrators because they are just too tech-

nical, complicated, or detailed, or they require expertise not possessed by Members of Congress. *See Buttfield* v. *Stranahan*, 192 U.S. 470, 496 (1904).

Lastly, and particularly in cases involving broad delegations, the courts have been sensitive to the availability of judicial review as a check on the granting of uncontrolled discretion to delegates. *See e.g., Yakus*, 321 U.S. at 425, *Amalgamated Meat Cutters* v. *Connally*, 337 F.Supp. 737, 755, 757, 759 (D.D.C. 1971) (three-judge court).

Obviously, the factors described do not themselves provide one coherent theory for analyzing delegation problems. To be useful as yardsticks, they must not be viewed in isolation, as we believe the district court did, nor do they necessarily deserve equal weight. They must be examined as a whole and always in connection with the fundamental purpose of the delegation doctrine: the preservation of political accountability in our representative form of government.[8]

In the Act, Congress and the President, motivated by the wish both to balance the budget and to avoid being identified as the cause of the resulting pain, created a device that does both, the "automatic" trigger. The infirmity of the law is that it places in the hands of unelected officials the power to decide whether reductions in duly enacted appropriations laws will be made at all and how deep those reductions must be, and it makes the de-

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[8] Regarding the delegation doctrine's objective of ensuring accountability in governmental decisionmaking, see *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring); *McGautha* v. *California*, 402 U.S. 183, 272 (1971) (Brennan, J., dissenting); *United States* v. *Robel*, 389 U.S. 258, 276 (1976) (Brennan, J., concurring); *Amalgamated Meat Cutters* v. *Connally*, 337 F. Supp. 735, 746 (D.D.C. 1971) (three-judge court).

The commentators, too, have stressed accountability concerns in examining the delegation doctrine's rationale. *See, e.g.*, Wright, *Book Review*, 81 Yale L.J. 575, 582-587 (1972) (reviewing K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969)); J. Ely, *Democracy and Distrust* (1980) at 131-134.

cisions of those officials effective automatically. This enormous power is, in vital respects, unguided by the legislature and unchecked by anyone, including the judiciary. The result is that new, substitute laws are being made and effected outside the lawmaking framework established by the Constitution. As we shall show, while other statutes similar in some respects to the Act have survived delegation challenges, none had the cumulative infirmities found in the Act, which lead—indeed by design—to the utter frustration of the accountability objective that lies at the heart of the delegation doctrine.[9]

B. The Statute's Automatic Deficit Reduction Mechanism Frustrates the Delegation Doctrine's Central Purpose of Ensuring that Elected Legislators Be Accountable for the Fundamental Policy Determinations Concerning the Setting of Federal Spending Levels.

1. *The Automatic Mechanism Represents an Incomplete Exercise of the "Essentials of the Legislative Function."*

In the Gramm-Rudman Act, Congress failed to perform the "essentials of the legislative function." *Yakus*, 321 U.S. at 424. The Constitution demands that Congress itself make the "hard choices" that lie at the core of policy embodied in law. Examination of the circumstances surrounding the passage of the Act reveals a clear congressional purpose to avoid those hard choices and instead to transfer essential lawmaking responsibilities to the Act's administrators.

It has been widely accepted that the deficit is dangerously high and must be reduced. Virtually all who spoke in the Gramm-Rudman debate prefaced their remarks with protestations of absolute commitment to reducing

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[9] With the device of the legislative veto no longer available, Justice White predicted in dissent in *INS* v. *Chadha*, 492 U.S. at 968, Congress will be tempted "to abdicate its law-making function . . . ," resulting in "unaccountable policymaking by those not elected to fill that role." In our view, in passing the Gramm-Rudman Act, Congress has succumbed to the temptation to abdicate.

the deficit. It was also clearly understood what the limited options are for reaching that goal: significant defense reductions, significant reductions in non-defense programs, cuts in "entitlement" programs, tax increases, or some combination of these. *See, e.g.*, remarks of Sen. Nunn, 131 Cong. Rec. S17425-26 (Dec. 11, 1985). Everyone also understood that these truly difficult choices have not been made in the Act itself.

In fact, the congressional debates make quite clear that Congress intended to avoid those basic choices that are the essence of policymaking, because it wished to avoid accountability for such unpopular choices. It intended that the budget be balanced through the automatic mechanism without ever requiring Congress to vote on specific spending reductions or tax increases.[10]

We discuss *infra* at 21-24 the ways unelected officials exercise unfettered discretion under the Act. We show first, that Congress wished to and did avoid making essential policy choices; second, that the power ceded was a legislative power; and, finally, that the Act assures that Congress can continue to avoid being held politically accountable and that the result is abject failure to perform the essentials of the legislative function.

a. That Gramm-Rudman itself does not confront the hard decisions required to control the budget deficit was recognized by key supporters of the Act during the legislative debates. As Senator Dodd observed, "[t]he easiest

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[10] We recognize, of course, that in passing a statute as complex as Gramm-Rudman, it cannot fairly be said that Congress made no policy choices. For example, it decided that certain federal programs were to be exempt from budget reductions and it determined that the automatic cuts were to be divided evenly between defense and non-defense programs. But clearly it does not follow that because Congress made *some* policy decisions, it therefore fulfilled its legislative responsibilities. One cannot ignore what Congress chose *not* to do: namely, to choose among the known alternatives for reducing the budget, and to decide whether cuts would be made at all in a given year, and what the depth of those cuts would be.

vote we will cast . . ." is the one in favor of the Act. 131 Cong. Rec. S17427 (Dec. 11, 1985). Indeed, Senator Gramm, a co-author of the Act, acknowledged that the hard choices of budget balancing were yet to be made when he said that the automatic mechanism was intended as a "disciplining agent" which would only take effect "if we fail to do our job." *Id.* at S17389 (Dec. 11, 1985). He had earlier explained that the point of the mechanism was to "make Congress make hard decisions . . ." *Id.* at S12962 (Oct. 9, 1985).

But, in addition to showing that the Act fell short of grappling with the difficult choices of budget policy, the legislative debates underscored Congress' unabashed wish to avoid political accountability for those choices through the shield of the automatic mechanism, a scheme that was strongly criticized by the Act's opponents. Senator Mathias urged that the Act embodied a process that

> . . . is mechanical, it is preset; it is mindless, and no one need accept blame. This [Act] searches for a way to evade the hard choices that deficit reduction demands. It strives for a way to reach the goal without taking responsibility. It represents budget balancing by anonymous consent.

Id. at S14919 (Nov. 6, 1985).

Representative Gray similarly stated that the Act "encourages Congress to avoid hard decisions, secure in the knowledge that a sequestration of funds is to come that will do it instead." *Id.* at H11889 (Dec. 11, 1985). Rep. Hartnett declared that "if Webster's could define Gramm/Rudman it would be something like this: an abdication of congressional responsibility, a loophole through which Congressman can slide." (*sic*) *Id.* at H11889 (Dec. 11, 1985). Finally, Rep. Waxman lamented that, in adopting the Act, Congress had established Government "by automatic pilot . . . And when the ax falls and when our constituents come to us . . . the answer from the President and the Congress will be, I'm sorry, I am not responsible. Your misery is caused by a budget process that is beyond

our control. It is out of our hands." *Id.* at H11881 (Dec. 11, 1985).[11] Finally, Senator Kennedy, a supporter of Gramm-Rudman, recognized that the Act reflected Congress' inability to meet its responsibilities when he observed that making automatic "across-the-board cuts" was the only real avenue to achieve a balanced budget because "Congress itself seems to lack any will or strategy to limit and then eliminate the deficit under present procedures." *Id.* at S12961 (Oct. 9, 1985).

Hence, what the legislative debates starkly disclose is an "obvious example of Congress simply avoiding a choice which was both fundamental . . . and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). But, as we have maintained, it is precisely these fundamental budget choices that our Constitution requires be made by accountable, elected officials under our republican form of government. When such choices are to be made "the buck stops with Congress and the President, insofar as he exercises his constitutional role in the legislative process." *Id.* What this Act provides should Congress itself fail to legislate to meet its deficit targets is a mechanism for the surrender of policy making authority through the automatic reduction process.[12] In the absence of congressional confrontation of the necessary choices of budget-balancing, the Act creates a policy vacuum which is permitted to be filled by the "unthinking, bloodless" determinations of the automatic mechanism.[13]

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[11] *See also*, remarks of Reps. Conte, Garcia, Rodino, Hyde and Levine at 131 Cong. Rec. H11885-11890 (Dec. 11, 1985).

[12] As Judge Wright has observed: "An argument for letting the experts decide when the people's representatives are uncertain or cannot agree is an argument for paternalism and against democracy." Wright, *Book Review, supra*, 81 Yale L.J. at 585.

[13] 131 Cong. Rec. H11885 (Dec. 11, 1985) (remarks of Rep. Hyde).

b. When the automatic trigger operates, as it did in the current fiscal year, an administrative spending reduction process, substituting for previously enacted laws, automatically takes effect. That this mechanism represents a surrender of the "essentials of the legislative function" is demonstrated by this Court's analysis in *INS* v. *Chadha*, where this Court defined power of a "legislative character." 462 U.S. at 952. In *Chadha*, the Court determined that the legislative veto device must be struck down because it represented the exercise of legislative power without adherence to Article I's lawmaking requirements. Crucial to the Court's determination that the veto was essentially legislative in nature was the fact that the veto "had the purpose and effect of altering the legal rights, duties and relations of persons . . . outside the Legislative Branch". *Ibid.* In addition, the veto's "legislative character" was "confirmed by the character of the Congressional action it supplants." *Ibid.*

By these standards, the administrative determinations that result in budget reductions under the automatic mechanism are legislative actions. When the automatic mechanism comes into play, previously enacted appropriations statutes are nullified and supplanted by the determinations of administrators. In effect, the Act authorizes the President, through his issuance of a sequestration order, to undo duly enacted statutes with something that is less than a law.[14] When it takes effect, that order, as a practical matter, constitutes automatic substitute legislation which directly alters the legal rights and obligations of persons just as a duly passed appropriations law would. In sum, by giving away, in its most basic sense, fundamental lawmaking power, Congress has failed to exercise for itself the essentials of the legislative function.

c. As seen, many legislators agreed with our view that this Act is an unprecedented abdication of Congressional

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[14] *See* letter of Rep. Rodino, quoted in 131 Cong. Rec. H9607 (Nov. 1, 1985).

authority.[15] Supporters countered that this bill would bring "discipline" to the budget problem because the spectre of draconian cuts under the automatic trigger would force Congress and the President to make the "hard decisions." *See, e.g.*, remarks of Sen. Gramm, *id.* at S12962 (Oct. 9, 1985) and S17389 (Dec. 11, 1985).[16]

If Congress had simply reserved the necessary budget choices for another day, no delegation would occur and no constitutional issue arise. But the heart and sole reason for this Act is its automatic trigger device. The Act is completely predicated on the trigger being pulled and accomplishing the desired goals, as it has been pulled in the current fiscal year. As Senator Heinz aptly put it, the device is Congress' way of saying, "[s]top me before I kill again." 131 Cong. Rec. S12973 (Oct. 9, 1985).

Moreover, although many of the Act's supporters depicted the automatic trigger mechanism as a "club" that would force Congress to do its job, there was also a clear recognition that instead of acting as a "disciplinary agent," the trigger could prevent responsible budget cutting. As a colloquy among Senators Stevens, Packwood, and Domenici (the latter two key supporters of the bill) illustrates, a concern existed that the automatic trigger would actually be a disincentive for Members to make the hard budget choices.

Senators Stevens' questions focused on the problem of the so-called "double hit" that would befall those legislative committees which struggle during the appropriations process responsibly to reduce program spending. He pointed to the hypothetical situation of a defense appropriations committee deciding to decrease its spending

[15] *See, e.g.*, remarks of Rep. Levine, 131 Cong. Rec. H11890 (Dec. 11, 1985), remarks of Rep. Rodino, *id.* at H9607 (Nov. 1, 1985), and remarks of Sens. Hatfield, Bumpers, Hart, DeConcini, Lautenberg, and Byrd, *id.* at S12966 (Oct. 9, 1985), S13107, S13092, S13108 (Oct. 10, 1985), S14917 (Nov. 6, 1985), S17441 (Dec. 11, 1985), respectively.

[16] *See also, e.g.*, remarks of Sens. Hollings, *id.* at S17390 (Dec. 11, 1985), and Packwood, *id.* at S17430 (Dec. 11, 1985).

authorization by a significant amount, only to be hit with yet additional cuts if the fixed percentage reductions of the automatic mechanism were triggered. As he explained, if the committee successfully insisted that the Congress fund its programs to the maximum and then had to endure the automatic cuts, its programs would clearly fare better than if it had to absorb the double hit. 131 Cong. Rec. S17429 (Dec. 11, 1985).

Senator Packwood, a staunch supporter of the Act, admitted that Senator Stevens had "put his finger on a genuine problem . . . to which I do not have an answer, except we are all in the same boat together." *Id.* at S17430. Senator Domenici offered that it was unlikely that any programs would have to absorb disproportionate double hits because committees would refuse to make cuts unless they saw others doing the same. *Id.* at S17431. Senator Stevens replied that Senator Domenici "just answered my question. That is what I was afraid would happen. People will sit around and do nothing." *Ibid.*

The significance of the colloquy is obvious: rather than acting as a "club," the automatic mechanism is likely to have the opposite effect. And when the automatic mechanism does take effect, as it already has once, it will mean, as even Senator Gramm candidly acknowledged, that Congress failed again to fulfill its legislative responsibilities. *Id.* at S17389 (Dec. 11, 1985).

Finally, it should be noted that, even if this Act were magically to provide the "backbone transplant" to Congress that sponsoring Senator Rudman hoped for,[17] the Act is structured so as to make it virtually impossible to complete a responsible budget package. Any party necessary to a compromise that believes its interests would be better served by automatic sequestering can refuse to agree, and thereby guarantee that sequester will take place.[18] For example, if the Congress decides that a tax

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[17] 131 Cong. Rec. S12962 (Oct. 9, 1985).

[18] Remarks of Sens. Gore, 131 Cong. Rec. S12900 (Oct. 8, 1985); Riegle, *id.* at S17410 (Dec. 11, 1985); Lautenberg, *id.* at S17435 (Dec. 11, 1985).

increase is necessary to reach the deficit target, but the President disagrees and views automatic sequester as preferable, he need only veto the tax increase. Automatic reductions would then occur in contravention of the majority will in Congress.

In sum, Congress and the President expected that the automatic mechanism would in fact function and relieve them of responsibility; indeed, the device provides strong disincentive to reaching any agreement on the necessary legislative choices, and implements the decisions of non-legislators when agreement cannot be reached.

2. *The Act Provides Insufficient Standards to Guide the Administrators in the Making of the Critical Budget Deficit Projections Which Ultimately Form the Basis of an Automatically Enacted Federal Spending Law.*

As shown, under this Act statutes are re-written by non-legislators. A vital part of exercising the essentials of legislative power when broad power is delegated is that Congress fulfill its responsibilities by providing adequate standards to confine the discretion vested in the Act's administrators. As this Court has instructed—in a statement that underscores the delegation doctrine's key principle of ensuring accountability in decisionmaking—the critical inquiry is whether there is a standard that "sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will." *Yakus*, 321 U.S. at 425. Though the district court failed to heed its own observation, it correctly stated that where the scope of the delegated power grows broad, the standards governing it "must be correspondingly more precise" (J.A. 45) if the delegation is to be meaningfully confined. We believe that the Act's delegation is fatally defective because it gives its administrators unbridled discretion in making the pivotal budget deficit projections which ultimately form the bases of an automatically enacted appropriations law for the entire federal government.

a. The unharnessed authority that the Act confers on the administrators is revealed by a few salient facts. The Act's "automatic" budget cuts take place upon the administrative prediction that a deficit exceeding the target amount by more than 10 billion dollars will occur.[19] Although the administrators are given instructions on how to estimate spending levels where appropriations have not yet been made (more fully described *infra* at 24-25), they are given no instructions as to how to determine the key economic conditions that form the bases of any budget deficit estimate. The delegation flaw in this scheme rests in the entirely open-ended discretion of the administrators to determine the projected deficit. This determination is pivotal, for it ultimately dictates whether and in what amount spending must be reduced to achieve the deficit target. Yet, one searches in vain for *any* statutory guidance regarding the making of these projections. Indeed, the Act fails even to tell *what* determinations are required to arrive at the deficit estimates much less prescribe *how* those determinations are to be made.

Thus, estimating the federal government's future revenues and outlays is left entirely in the administrators'

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[19] The Directors of OMB and CBO are instructed to estimate the "budget base levels of total revenues and budget outlays" for the upcoming fiscal year. Sec. 251(a)(2); J.A. 108-110. The projected deficit is then computed by figuring "the amount by which total budget outlays for such fiscal year exceed total revenues" for that year. Sections 257(4), 201(a)(1); J.A. 161, 103-104. If the estimated deficit exceeds the target by 10 billion dollars or more, the Directors must identify spending reductions as specified by the Act. Sections 251(a)(3), 255, 256 and 257; J.A. 110, 114, 143-161. The Directors then jointly report their conclusions to the Comptroller General who "with due regard for the data, assumptions and methodologies" used by the Directors issues his own report making the same kind of estimates and determinations found in the Directors' report. In the absence of appropriations legislation meeting the deficit targets, the President ultimately must issue an order making the spending cuts specified in the Comptroller General's report. Sec. 252(b)(1)-(3); J.A. 116-122.

discretion. Those estimates are, as suggested, totally dependent upon assumptions about general economic conditions. Among the economic variables affecting government spending and revenues are interest rates (which affect, among other things, payment on the national debt), inflation, the unemployment rate (which influences both the amount of income tax collected and the amount of unemployment compensation paid), the international trade deficit, the strength of the dollar, the gross national product, and the price of oil. Obviously, any computation that must consider all of these variables—assumptions about which experts routinely disagree—is virtually sheer speculation. No matter how fully informed the experts are, unpredictable events occur which affect the deficit. Thus, even when experts agree, they may all be wrong if the price of oil rises dramatically or international conflict breaks out.

The highly conjectural nature of economic forecasting and its direct effect on the budget estimates required by the Act were frankly described by Dr. Rudolph Penner, Director of CBO, during hearings on Gramm-Rudman:

> Given the record of economists, it will not be difficult to convince anyone that economic forecasting is a very uncertain art. Reasonable men and women can differ widely about what the future holds, and even if there is agreement on an economic forecast, there is an added layer of uncertainty involved in translating that forecast into an estimate of budget totals . . . .

Hearings on H.J. Res. 372 Before the Subcomm. on Legislation and National Security of the House Comm. on Govt. Operations, 99th Cong., 1st Sess., 156-157 (1985). Underscoring that the problem was not forecasting itself, but giving the forecasts automatic effect, Dr. Penner stated:

> It is hard to think of other instances where unelected officials have such power to do good or evil . . . I think the really basic problem is one of linking budgetary policies that should be determined by

> elected representatives to the inherently uncertain forecasts of technicians.

Ibid.[20]

In sum, as the district court stated, the standard guiding delegated power must grow correspondingly more precise as the scope of delegated authority increases; therefore, this delegation to estimate the federal deficit, which lies at the heart of the automatic reduction mechanism, is plainly inadequately guided. The nature of its impact could hardly be more far-reaching; it serves as the base determination on which the amount of across-the-board federal spending for a particular year is calculated and becomes law through the automatic mechanism. Yet the Act gives the administrators free rein essentially to make whatever kind of assumptions they wish in estimating the deficit. In predicting the deficit, the administrators are in fact deciding whether automatic cuts will take place and in what degree. How such a delegation can be viewed as "canalized within banks that keep it from overflowing," *A.L.A. Schechter*, 295 U.S. at 551 (Cardozo, J., concurring), is hard to fathom.

b. The district court identified three reasons to support its conclusion that the Act contained "constitutionally adequate legislated standards." J.A. 48. First, it observed that the Act specifies the assumptions to be made by the administrators in computing the budget base. However, as noted above, these directions provide guidance only to cover areas where Congress has not yet

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[20] Senator Moynihan, an opponent of the Act, described the tying of budget making to economic forecasting as "mad scientism" which the Act makes "the engine of fiscal policy." 131 Cong. Rec. S14906-07 (Nov. 6, 1985). He observed that "[t]his entire machine for deficit reduction rests on our ability to forecast increases or decreases in the gross national product and the deficit. And that we cannot do with any semblance of confidence." *Id.* at S14905. He referred to Dr. Penner's testimony that "any forecast of GNP a year ahead that is off by no more than 1 percentage point [is] an excellent forecast," but appropriately noted that when growth is projected at 4 percentage points, "an error of 1 percentage point is obviously sizable." *Ibid.*

acted on appropriations measures for the coming year. For example, they are directed to assume "the continuation of current law in the case of revenues and spending authority." Section 251(a)(6)(A); J.A. 115-116. They are to assume "appropriations equal to the prior year's appropriations . . . ," except where an annual appropriation or continuing resolution appropriation has already been enacted. Section 251(a)(6)(B); J.A. 116. In addition, they must assume that expiring revenue and spending laws will expire. Section 251(a)(6)(C); J.A. 116.

But these assumptions are the easy ones; they comprise only a few of the many that the administrators must make in estimating the base levels of outlays and revenues. The court below simply ignored that critical assumptions about economic variables must also be made, and, as to these determinations, the Act furnishes no guidance or limitation.

The district court also maintained that the Act confined administrative discretion by defining such terms as "budget outlays," "budget authority" and "deficit." J.A. 49. But again these definitions fail to instruct the administrators even generally as to what they should do in factoring economic conditions into their budget predictions.[21]

Finally, the court asserted that the required assumptions and definitions were guided by "years of administrative and congressional experience in making similar

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[21] Among the guiding definitions cited by the district court was that for "real economic growth." J.A. 49. But this definition does not help cure the defect of which we complain because it does not apply to the administrators' estimates of budget deficits. The Act requires a forecast of real economic growth for a separate reason: to forewarn Congress of any coming recession, in which event special provisions of the Act come into play. *See* Sections 251(a)(1)(C), 254(a), 257(6); J.A. 109, 134-139 and 161 respectively. To the extent real economic growth is considered in calculating the deficit estimates, that projection is obviously only one of many the administrators must assess; as to those other variables the Act gives no guidance.

economic projections and calculations . . ." J.A. 50. To be sure, the cases do suggest that the court may look to historical context and the "common lore" (*Amalgamated Meat Cutters*, 337 F.Supp. at 748) as evidence that Congress has established the bounds within which the Act's administrators must stay. The problem with applying such an approach here is that the "common lore" only underscores the absence of any meaningful norms that confine the administrators' budget forecasting. On the contrary, the district court's claim that "the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations" (J.A. 50) is belied by the almost universal recognition that forecasting involves complex calculations about which even the experts sharply disagree.[22]

c. Finally, the court below viewed the Act as nothing more than "contingent legislation" (J.A. 46), no different from other statutory schemes approved by this Court in such cases as *The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382 (1812); *Field* v. *Clark*, *supra*; *United States* v. *Rock Royal Co-operative*, 307

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[22] The folly—and abdication of congressional responsibility—of tying federal spending levels to economic forecasts is underscored by economists' characterizations of such prognostications. Emile van Lennep, who served as head of the Organization for Economic Cooperation and Development, observed that: "Economic forecasting is necessary, but it cannot and should not be used as a reliable guide for economic policies." *When Economic Forecasters Miss the Target*, U.S. News & World Report 80 (Nov. 12, 1984). Harvard economics Prof. Dale Jorgenson has remarked, "I wish I could say economists are powerful thinkers and can tell what's going to happen . . . But they haven't the slightest idea and never had." *What Good Are Economists?*, Newsweek 61 (Feb. 4, 1985). Martin Feldstein, another Harvard economist has said: "One of the great mistakes of the past 30 years of economic policy has been an excessive belief in the ability to forecast." *The Forecasters Flunk*, Time 42 (Aug. 27, 1984). Finally, President Reagan commented not long ago: "Those [economic] projections, frankly, I pay no attention to them." *What Good Are Economists?*, *supra* at 60.

U.S. 533 (1939), and *Currin* v. *Wallace*, 306 U.S. 1 (1939). The district court asserted that Congress has simply provided that the "full effectiveness of all appropriations legislation" will be contingent upon the administrative determination that the legislation has met the specified budget deficit targets. J.A. 46. The court urged that the delegated authority "does not differ in kind from that approved in prior cases." *Ibid.* We disagree.

The material difference between the typical "contingency" statute and this one is found in the nature of the contingencies themselves. Generally, the power to ascertain whether a contingency has occurred has been delegated to administrators. The delegate typically reviews past events and decides whether the condition Congress specified has occurred. In this case, however, the administrators have the sole power to predict what future conditions will be, and their predictions automatically determine what the law will be. In other words, the delegate is deciding whether the contingency *will* occur, not determining ascertainable facts.[23]

For example, in *The Brig Aurora*, the Court examined whether a statute gave the President too much discretion in authorizing him to lift a trade embargo against Britain and France if he found that both had ceased violating "the neutral commerce of the United States." 11 U.S. (7 Cranch) at 383-84, 86. The Court concluded that it did not, because the power delegated was confined to fact-finding and involved only a limited exercise of discre-

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[23] Similarly, and contrary to the district court, we believe the Act differs materially from statutes containing provisions contingent, for example, on the consumer price index (CPI). The scope of the power delegated in such statutes is clearly more confined because it involves what are essentially adjustments to spending decisions legislatively made. Determination of the CPI is basically a fact-finding exercise which involves a measurement of past economic conditions pursuant to a formula that is at least well established. Such calculations simply cannot be fairly equated with the making of unguided, highly speculative projections—involving assumptions upon which few can agree—that then serve as the foundation for a government-wide spending policy.

tion. Similarly, in *Field* v. *Clark*, Congress authorized the President to raise tariffs and suspend trade with a foreign nation if he determined that a duty imposed by that country on American goods was "reciprocally unequal and unreasonable." 143 U.S. at 693. Again, the Court upheld the delegation, stating that it could not be said that "when the President ascertained the existence of a particular fact . . . he exercised the function of making laws." *Id.* at 693. These cases involve statutory delegations clearly different from that made by this Act. First, in the "contingent legislation" cases, Congress enacted a law, and instructed the President to determine when particular provisions of that law should take effect. Gramm-Rudman, however, is unique: it allows administrators effectively to supplant other duly enacted statutes and, indeed, it has a continuing effect on future appropriations laws by ultimately making them subject to administrative determinations. In addition, the nature of the executive determinations in those cases related to past events, not, as here, to predicting future events. By pegging operation of those laws to "ascertainable" facts or concrete events, Congress had adequately confined the exercise of the delegated discretion.[24]

Because the administrators of this Act are required to predict a highly complex, future contingency, the result is necessarily extremely speculative. The tying of automatic, substitute legislation to such speculation can hardly be justified on the basis of "fact finding" cases.

3. *The Rationale of "Governmental Necessity" Cannot Justify the Act's Delegation.*

In examining broad delegations, this Court has often considered whether they have been "born of the necessi-

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[24] The Court's decisions in *Currin* v. *Wallace*, 306 U.S. 1 (1939) and *United States* v. *Rock Royal Co-operative*, 307 U.S. 533 (1939) likewise concern executive fact-finding of a relatively limited nature, rather than prediction of future events. In the former, the fact to be determined was the result of a referendum; in the latter, a finding that a price adjustment was needed to sustain farmers' purchasing power at a level equivalent to their purchasing power during a statutorily prescribed base period.

ties of the occasion." *A.L.A. Schechter*, 295 U.S. at 552 (Cardozo, J., concurring). Considerations of flexibility and practicality have been cited as justifying delegations, particularly where the matter legislated is "sufficiently technical, the ground to be covered sufficiently large, and the Members of Congress themselves not necessarily expert . . ." *Industrial Union Dept.* v. *API*, 448 U.S. at 675 (Rehnquist, J., concurring).

Indeed, the so-called principle of governmental necessity played an important role in the upholding of two statutes making extremely broad delegations. In *Yakus* v. *United States*, *supra*, the Court sustained a delegation giving an administrator broad power "to promulgate regulations fixing prices of commodities." 321 U.S. at 420. In upholding this war time measure, the Court declared that the Constitution "does not demand the impossible or the impracticable." *Id.* at 424. Similarly, in *Amalgamated Meat Cutters*, *supra*, a three-judge district court upheld a delegation to the President to set wage and price controls and cited, among other reasons, "the practicalities and necessities of the public interest." 337 F. Supp. at 752.

This case presents, however, a situation materially different from those in *Yakus* and *Amalgamated Meatcutters* and, indeed, from any other case, because the delegation here was not made out of "necessity" as that term has been previously used. The power granted to the administrators under the Act—that is, the power to set spending levels—was not ceded because what was required was too technical, complex, or time consuming for Congress to accomplish. Indeed, Congress in the past has managed to make these very budget decisions every year and, under the Act, will at least continue to go through the motions of passing appropriations measures in the future. Stated plainly, the necessity that impelled the delegation made by this Act was, as our earlier discussion of the debates established, the desire to avoid accountability for the divisive spending reductions which

Congress has perceived are required, but the nature of which Congress could not bring itself to specify.

It is this congressional effort to evade responsibility that makes the Act constitutionally unacceptable. As Senator Byrd put it, the "Founding Fathers never envisioned a government bound by a formula, and yet that is exactly what [the Act] would impose on the country." 131 Cong. Rec. S17442 (Dec. 11, 1985).[25]

If an Act so conceived is allowed to stand, the delegation doctrine's underlying objective—namely, to ensure that "important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will"—will be rendered meaningless.[26] Congress would then be able to shield itself—for the first time with the blessing of this Court—from accountability through the "necessity" of political expediency.[27] Such a result would be flatly at odds with the Court's recent teaching in *Chadha* that the fact that a given "procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives—or the hallmarks—of democratic government . . ." 462 U.S. at 944.

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[25] *See, e.g.*, *The Federalist*, No. 51 at 322 (J. Madison) (McLean, ed., New American Library, 1961) ("In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and *in the next place oblige it to controul itself*." (Emphasis added.))

[26] *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. at 685.

[27] *See* J. Ely, *Democracy and Distrust*, *supra*, at 137: "That legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine. Were it to turn out that legislators forced to govern wouldn't have the courage to do so energetically, that would often be too bad . . . but at least it would be our system."

4. *The Unchecked Nature of the Discretion Vested in the Act's Administrators Is Underscored by the Preclusion of Judicial Review of the Crucial Budget Projections that Determine the Magnitude of Required Reductions in Federal Spending.*

The availability of judicial review has long been viewed as a principal safeguard against overbroad delegations of legislative power. As this Court stated in *Yakus*, such review plays a critical role in ascertaining "whether the will of Congress has been obeyed" and ensuring that a statute's administrator acts "in compliance with the legislative will." 321 U.S. at 425. The importance of judicial review as a means of keeping a delegation within proper bounds was emphasized recently in *Chadha* where the Court observed that a delegation "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded, it is open to judicial review . . ." 462 U.S. 953-954, n.16. Indeed, in the three cases cited by the district court as examples of the upholding of delegations similar to the Act in their breadth (J.A. 45), the availability of judicial review was a critical element in sustaining the statutes under challenge. See *Yakus* v. *United States*, 321 U.S. at 425; *Bowles* v. *Willingham*, 321 U.S. 503, 515-516 (1944); and *Amalgamated Meat Cutters*, 337 F.Supp. at 746, 755, 757, 759. In short, the cases demonstrate that the opportunity for judicial review of administrative action, while not an absolute litmus test, is at least a highly significant factor in measuring whether a particular delegation is sufficiently checked.

Here, in sharp contrast to other cases involving similar sweeping delegations, the pivotal determinations that trigger the operation of the automatic spending reduction mechanism are entirely insulated from judicial review. Specifically, section 274(h) of the Act provides that the Comptroller General's calculation of "the base levels of total revenues and total budget outlays . . . shall not be subject to review in any judicial or administrative proceeding." J.A. 166. Hence it is clear that the discre-

tion vested in the Act's administrators as to the key budget projection determinations is completely unbridled. It is checked neither by any legislative standards nor by scrutiny from the courts.[28]

We are not contending, however, contrary to the district court's suggestion, that judicial review of the administrators' determinations could save this delegation. J.A. 53. We recognize that the kinds of complex, technical forecasting determinations involved in budget deficit projections are singularly unsuited for court review. Clearly, the courts are inherently incapable of assessing the validity of estimates involving, for example, the impact of inflation or interest rates on future government expenditures or revenues.

The absence of judicial review is nonetheless relevant because it further underscores just how uncontrolled the administrators are in their power to establish the range of federal spending by dictating the amounts of budget cuts that must occur. Stated another way, what follows from the impracticability of judicial review of the key budget projections is not that Congress can therefore give a blank check to the Act's administrators to make federal spending determinations. What follows is that meaningful accountability in the budget setting process can only come from direct congressional involvement in the complex and policy-laden budget determinations that are finally adopted as law.

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The foregoing demonstrates that if accountability of elected officials is to have any meaning in the context of the delegation doctrine, then this Act cannot stand. We have seen, through the words of the Act's own architects,

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[28] As the district court correctly observed, the Act does permit review of certain specified actions of its administrators. J.A. 52. *See, e.g.*, Section 274(d) (J.A. 164) (allowing review of sequestration orders to ensure their compliance with statutory requirements). But the fact remains that the key determinations which ultimately define the contours of budget reductions are immune from judicial oversight.

that Gramm-Rudman was specifically designed, unlike any other statute reviewed by this Court for delegation defects, to overcome political paralysis and allow achievement of a balanced budget through an anonymous no-fault administrative trigger. We have shown that, in the assignment of the far-reaching task of determining federal spending levels, the ties that bind the Act's administrators to our elected representatives are barely discernible and, indeed, non-existent with respect to the making of the pivotal budget forecasts. And, we have demonstrated that unlike other cases that have sanctioned broad delegations, the key administrative determinations are to go unchecked not only by Congress but by the judiciary as well. We think it clear that if this congressional surrender of responsibility is sustained "the line which separates legislative power to make laws, from administrative authority" to enforce them (*United States* v. *Grimaud*, 220 U.S. 506, 517 (1911)) will not only remain restraint of definition, but will, once and for all, have evaporated.

II. THE ACT VIOLATES THE SEPARATION OF POWERS PRINCIPLE BY DELEGATING TO THE COMPTROLLER GENERAL, AN OFFICIAL REMOVABLE BY CONGRESS, A SIGNIFICANT ROLE IN THE ADMINISTRATION OF THE ACT.

The court below held that, because he is removable by Congress, the Comptroller General may not wield the executive power assigned him by the Act, without transgressing the separation of powers. J.A. 61. Congress has retained ultimate power over the Comptroller General, and thereby ultimate control in the administration of this law. Because Congress cannot both make and execute the law, the Act's automatic deficit reduction provisions are unconstitutional.

In analyzing the Comptroller General's powers under the Act, the court below stated that he is to exercise "substantial judgment concerning present and future facts that affect the application of the law," and, to a degree, to decide how the law applies to various govern-

ment programs. J.A. 72-73. The court characterized these as "executive powers in the constitutional sense." J.A. 73. In Point I above, we have argued that, insofar as the Comptroller General actually determines whether broad-based budget reductions will occur at all, and by what percentage, he is exercising the essentials of the lawmaking function. However, if he is not making law, then, at the very least, he has a very significant role in administering and implementing the law.[29] In coordination with CBO, whose role presents an overlapping problem of shared administration of the law,[30] the Comptroller General must make every meaningful final decision under the Act, beyond those already made by the legislature. That being the case, he is unquestionably exercising executive duties.

As appellants acknowledge, these duties, however they are characterized,[31] were assigned to the Comptroller

[29] Upon receiving the OMB/CBO report, the Comptroller General specifies the levels of anticipated revenue and spending that dictate the gross amount required to be sequestered. As we demonstrated in Point I, his projections concerning the budget deficit and the resulting sequestration depend heavily upon his analysis of the state of the economy. After specifying the gross amount to be sequestered, he must then determine the particular budget outlays in each financial account that are to be reduced and in what amounts. Finally, he is required to submit a revised report, updating his earlier conclusions. The Comptroller General's findings are binding upon the President, leaving him no room for discretion in his execution of the law. Moreover, Section 253 of the Act requires the Comptroller General to report to Congress on the extent to which the President has complied with his order.

[30] We agree with the Congressional appellees that the role of CBO makes the Comptroller General even more vulnerable to congressional interference with his duties under the Act, since the Director is removable by resolution of either House, *see* 2 U.S.C. 601(a)(4) (1982). In addition, we agree, for the reasons stated in the Synar Brief, Argument II, that the participation of CBO represents an independent breach of the separation of powers doctrine.

[31] Appellants characterize these duties variously as "administrative duties" (Sen. Br. at 18), "functions" or "traditional functions" (House Br. at 11-13), and "administrative functions" (CG Br. at 15, 42-47), studiously avoiding the description "executive." The

General large part out of substantial fear that they could not onstitutionally be assigned to the Congressional Budget Office, an undoubted creature of Congress. *See* Sen. Br. at 40; CG Br. at 39. But the court below accurately saw that the Comptroller General, too, owes his ultimate loyalty to Congress, and that therefore he cannot administer the law, any more than the CBO could have.

We shall show that separation of powers principles are indeed violated in this Act, that the Comptroller General is as a matter of fact and law beholden to Congress, and that the court below properly struck down the 1985 grant of power rather than the congressional removal provision of the 1921 statute.

A. Separation of Powers Principles Dictate That Congress May Not Both Make and Execute the Law.

The guiding principles of the doctrine of separation of powers are easy to recite, if sometimes difficult to apply. We know that it is an "archaic view" of the doctrine to require "three airtight departments of government," *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 443 (1977), and that "hermetic sealing off" of the branches "would preclude the establishment of a Nation capable of governing itself effectively." *Buckley* v. *Valeo*, 424 U.S. 1, 121 (1976).

It is also clear that there is a need for "limiting principles" in permitting the crossing of the boundaries between branches of government. *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 73 (1982). It is not the occasional blending of powers, representing the "pragmatic, flexible approach of Madison," *Nixon* v. *Administrator of General Services*, 433 U.S. at 443, with

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Comptroller General would trivialize these functions by describing them as mere "factfinding functions" which are "far more circumscribed than functions assigned to other independent agencies." Br. at 43, n.125. In view of the substantial judgment and discretion required, as well as the sweeping impact of these decisions, it is surely inappropriate to view them as mere chores.

which we are here concerned. Rather, it is the retention by Congress of control over virtually the entire administration of the Act that breaches the principles.

The separation of powers principles are designed to ensure that "the carefully defined limits on the power of each Branch must not be eroded." *INS* v. *Chadha*, 462 U.S. 919, 958 (1983). The legislative veto device outlawed in *Chadha* was of course such an erosion, the fundamental problem of which "is that it represents an attempt by Congress to retain direct control over delegated adminstrative power." *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 476 (D.C. Cir. 1982), *aff'd*, 463 U.S. 1216 (1983). J.A. 77-78. The same vice exists in the automatic deficit reduction provisions of this Act. If the President's power to execute the laws "refutes the idea that he is to be a lawmaker," then Congress' lawmaking power refutes the idea that it may also execute the laws. *See Youngstown Sheet & Tube* v. *Sawyer*, 343 U.S. 579, 587 (1952).

In this Act, Congress' ultimate control over the Comptroller General and the CBO gives Congress continuing and pervasive influence in the Act's administration—precisely what the separation of powers forbids.[32]

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[32] The Third Circuit recently held in *Ameron, Inc.* v. *U.S. Army Corps of Engineers*, Nos. 85-5226 and 85-5377 (March 27, 1986), that the Comptroller General could constitutionally perform the executive duties assigned him by the Competition in Contracting Act (CICA), 31 U.S.C. 3551-3556 (1984), notwithstanding that he is removable by Congress. The Comptroller General's role under CICA is to review government contract bid protests, the filing of which automatically stay the contract. Slip op. at 6-7. The Comptroller General's role is largely advisory, and, unlike his role under Gramm-Rudman, he has "no ultimate veto over government appropriations." *Id.* at 25. The Comptroller General's power under Gramm-Rudman is manifestly different. First, it is of a vastly greater magnitude, in that it involves considerable unreviewable discretion and affects virtually all federal programs and therefore all citizens. Second, it is of a different quality, in that under this Act, the Comptroller General exercises a power, unlike the ruling on individual bid protests, over which Congress has keen and abiding

B. The Comptroller General Is Beholden to Congress by Virtue of the Congressional Removal Power and of His Complete Independence from the President.

Although the President appoints the Comptroller General from among nominees supplied by Congress, it is Congress alone that has the absolute power of removal, accomplished by joint resolution, either with the President's concurrence or over his veto. 31 U.S.C. 703(a) and 703(e)(1)(B). He may be removed for any one of five reasons, including the open-ended "neglect of duty" and "inefficiency." *Ibid.*

The court below stated that the "here-and-now subservience" to Congress created by the Comptroller General's "presumed desire to avoid removal by pleasing Congress" creates the separation of powers problem. J.A. 57. Appellants all dispute this notion, taking particular umbrage at the word "subservience." CG Br. at 22-27; Sen. Br. at 18-20; House Br. at 31-33. But it is a matter of common sense that one looks for guidance and instruction to the power that keeps one in office. *Northern Pipeline*, 458 U.S. at 59-60.[33] Here, that power belongs to Congress, and, as we shall see, the President

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interest. The power it has retained over the decisionmaking, by assigning the determinative roles to the Comptroller General and CBO, enables Congress to exercise dominion over the Act's administration, in violation of the separation of powers. For the reasons stated herein, we believe the Third Circuit simply did not appreciate the Comptroller General's dependence on Congress. But in any event, his roles under CICA and Gramm-Rudman are not comparable in kind and in quality.

[33] Appellants are in error in contending that because removal of a Comptroller General has not yet been attempted, the effect of the removability upon his powers is not yet ripe for adjudication. Sen. Br. 25-31. The court below easily disposed of this argument by relying on *Northern Pipeline*, 458 U.S. 50, in which the impact of the bankruptcy judges' unconstitutional tenure came from their dependence on the President's power to reappoint. The constitutional vice here, said the court, was "exercised" in the same way: it creates an impermissible subservience, here to Congress. J.A. 57.

possesses no part of that power, or any other power, over the Comptroller General.

Appellants all make a critical error. They take pains to demonstrate the "independence" of the Comptroller General, so as to show that he is not subservient to Congress. *See* CG Br. at 24-27; Sen. Br. at 18-20; House Br. at 20-24. But they do so by emphasizing Congress' unquestioned intent to guarantee his independence from the President. During the 1921 congressional debates, for example, where this office was born, the point of contention, as described in the Comptroller General's brief, "was whether and how Congress could protect the new officer from removal at the pleasure of the President." Br. at 24. The whole purpose, it said, was "to make him independent, and therefore he had to be free from the threat of discretionary removal by the President." *Ibid.* Even the frequent congressional and judicial references (*see* J.A. 71, n. 29) to the Comptroller General as an "arm" or "agent" of Congress[34] do not suggest, in appellants' view, subservience to Congress, but merely "protection against discretionary removal by the President." *Id.* at 26; Sen. Br. at 20, n. 23.

The demonstrable fallacy is in assuming that the greatest separation from the President gives greatest independence from Congress also.[35] On the contrary, between two coordinate branches of government, the greatest independence is at the mid-point. The con-

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[34] *See, e.g., Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983); *McDonnell Douglas Corp.* v. *United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States* v. *McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *Delta Data Systems Corp.* v. *Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984). *See also*, the numerous statutory powers and duties embodying the "special relationship" between Congress and the Comptroller General listed by the court below at J.A. 71, n.29; and 2 U.S.C. 703(b) and 41 U.S.C. 601, *et seq.*, listing GAO as in the legislative branch.

[35] The Comptroller General's brief even suggests that his status as "arm of Congress" is merely a "synonym" for independence. CG Br. at 27.

tinuum stretches from total dependence on the President at one end (removal at will) to total dependence on Congress at the other end (removal by Congress at will), with the position of greatest independence mid-way between, where careful balance exists in the power and influence of both branches. The court below properly saw the position of the Comptroller General as near the congressional dependence end of the scale.

We have no reason to doubt the genuineness of the Congressional intent to keep the Comptroller General "independent." It is obvious that many of his significant duties, such as the auditing of, and preventing illegal impoundments by, executive agencies require complete independence from the President. The critical fact for purposes of this case is that Congress did not itself relinquish control. It clearly made the judgment that the best way to guarantee the necessary independence *from the President* was to reserve to itself the power to direct the Comptroller General, to control his budget, and to remove him from office. The court below was quite correct to view that reservation of power as creating "subservience."

Thus, as the court below noted, "[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey." J.A. 75. Indeed, control over an official's tenure in office has a greater effect over the independence of those officials than any other factor, with the obvious exception of one's compensation. *Northern Pipeline*, 458 U.S. at 60, *quoting* Alexander Hamilton, *The Federalist*, No. 79, p. 472 (McLean ed., New American Library 1961).[36]

[36] Appellants argue that appointment in conformity with the Appointments Clause enables the Comptroller General to exercise executive power assigned him by the Act. Sen. Br. at 14-17. But proper appointment is merely a necessary prerequisite to the wielding of significant executive powers; it does not follow that all officers so appointed may exercise such powers. Nor does *Buckley v. Valeo*, heavily relied on by appellants, say otherwise. There, the

The House brief, in particular, argues that the ruling of the court below would prevent "independent agencies" from performing functions they have "traditionally" performed. House Br. at 10-14. But the court below did not speak to the question of what independent agencies can do. It held that the Comptroller General may not be regarded as "independent," in the same sense as the Federal Trade Commissioner was in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). The House brief simply begs the question of the Comptroller General's independence.[37]

In establishing control over the Comptroller General's tenure, Congress has taken a giant step beyond its role approved in *Humphrey's Executor.* Instead of limiting the President's removal power, as it had done there, Congress kept for itself the power to remove the Comptroller General. The President cannot initiate removal; he cannot even prevent it if there is the support in Congress to override his veto.

Furthermore, the President has no other power which would offset Congress' absolute removal power. Although he appoints the Comptroller General, he selects from among nominees sent to him by Congress, making it extremely unlikely that he would wish to defend the Comptroller General, should Congress wish to remove him. He does not give instructions to the Comptroller General. And because the Comptroller General serves for a non-

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Court merely observed that the Comptroller General cleared the initial appointment hurdle, without exploring whether this fact alone enabled him to perform significant executive powers comparable to those authorized under this Act. *Buckley*, 424 U.S. at 128, n.165.

[37] The Comptroller General's brief similarly begs the question by arguing that the district court's ruling implicitly prohibits an "independent" officer from performing the functions at issue, but that instead the officer must be removable by the President at will. Br. at 12, 42 n.125. Of course, the district court explicitly declined to so hold. J.A. 60. It merely held that the Comptroller General is not sufficiently independent of Congress to exercise the powers assigned him under the Act.

renewable term, the President cannot even use his power to re-appoint as a counterweight to the congressional removal power. *See Northern Pipeline*, 458 U.S. at 58.

In sum, the cumulative effect of Congress' ultimate control over the tenure of the Comptroller General and the absence of any control by the President over his tenure or his duties transgresses the principle "that makes one master in his own house [and] precludes him from imposing his control in the house of another who is master there." *Humphrey's Executor*, 295 U.S. at 630. There is no independence in this imbalance.[38]

The fact that there has been no attempt to exercise the power to remove the Comptroller General does not suggest, as appellants would have it, that the power is vestigial. CG Br. at 31-33; Sen. Br. at 29-31. Its usefulness as an effective tool to guarantee allegiance does not require that it actually be exercised. It is not the act of removal, but the everpresent prospect that is of moment here. As the Comptroller General's brief notes (at 30, n.90), there are numerous instances in which officials resigned under a threat that charges would be brought against them. Thus, for most high government officials, the mere threat that public charges would be filed, alleging inefficiency, neglect of duties, or worse, is enough to cause them to step aside.[39]

It is simply illogical to contend that the Comptroller General does not take cognizance of Congress' direct power over his tenure, and behave accordingly. Indeed, it is even possible that the fact that removal has never been attempted is a testament to the effectiveness of the

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[38] Consequently, the Comptroller General is mistaken when he attempts to analogize his duties under the Act to the administrative role of the Board of Governors of the Federal Reserve System. Since Board members, unlike the Comptroller General, are removable by the President, albeit for cause, as are other independent agency heads, no separation of powers problem is presented.

[39] The unexercised legislative veto carries much the same threat, as noted by former Congressman, Judge MacKinnon, in dissent in *Clark* v. *Valeo*, 559 F.2d 642, 680-82 (D.C. Cir. 1977), *aff'd sub nom. Clark* v. *Kinnett*, 431 U.S. 950 (1977).

mere existence of the power as a device to ensure the Comptroller General's loyalty.

Finally, appellants argue that Congress' power to remove for cause is no more coercive than the similar presidential power approved by this Court in *Humphrey's Executor*, 295 U.S. 602, or the Senate's power to refuse to confirm a presidential appointment. CG Br. at 11, 27-30, 43. The argument, however, fails to recognize that the separation and balance between the branches are preserved in those situations, whereas they are violated here.

In *Humphrey's Executor*, there was no constitutional requirement of independence from the President. On the contrary, after *Myers* v. *United States*, it was thought that the President's power to remove, as incident to his constitutional power to appoint, was illimitable. 272 U.S. 52, 161 (1926); *In re Hennen*, 38 U.S (13 Pet.) 230, 259 (1839). The question was whether Congress, wishing to ensure independence from the President, could constitutionally limit that otherwise illimitable power. The Court had no occasion to consider whether presidential removal power might be too "coercive"; rather, it merely accepted the premise that Congress may set the terms for removal to provide some security to the Federal Trade Commissioner.[40]

The independence desired for the Commissioner was thus embodied in the statute, not required by the Constitution. The independence Congress sought was preserved by permitting *both* branches a role in the Commissioner's tenure. In contrast, here, as we have shown, the balance between branches is entirely upset by Congress' reservation of sole power over the Comptroller General's tenure.

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[40] The court below noted that, whatever restrictions may be placed on the President's power to remove, that power derives from the constitutional power to appoint. Any greater impact upon an officer's independence from the President's power, as compared with the Congress' power, "may properly reflect the greater strength of that pedigree." J.A. 76-77.

Balance between the two branches is similarly evident in the Senate's constitutional power to refuse to confirm a presidential reappointment, a lesser intrusion in any event than for Congress to take a direct role in removal.[41] Both branches play a role in the officer's tenure, and a measure of independence for the officer is preserved. But over the Comptroller General, the President has no balancing influence whatever.

In sum, the distinction between merely imposing restrictions on another party's power to remove and reserving that authority to oneself is plain. It is the total usurpation by Congress of the power over the Comptroller General's tenure that renders him subservient to Congress and incapable of administering the Act.

C. The Court Below Properly Struck Down the Act's Grant of Powers to the Comptroller General, Rather Than the Removal Provisions of the 1921 Act.

Appellants argue that if the powers granted to the Comptroller General under this Act and Congress' power to remove the Comptroller General cannot constitutionally co-exist, then the Court should choose which statute should fall. CG Br. at 15, 33-38; Sen. Br. at 31-2. In their opinion, congressional intent dictates choosing to invalidate the removal provision.

The court below properly refused to take that path. It regarded as extraordinary a suggestion that a court "even consider[] choosing" which statute to invalidate. J.A. 59. Based on the precedents of this Court, the district court found that the proper route was to set aside the statute embodying the alleged injury-in-fact that gives standing to plaintiffs. *Ibid*; *see Springer* v. *Government of the Philippines*, 277 U.S. 189 (1928); *Myers* v. *United States*, 272 U.S. 52 (1926); *Northern Pipeline*

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[41] *See Myers* v. *United States*, in which a veto by the Senate over presidential removal was said to be "a much greater limitation upon the executive branch, and a much more serious blending of the legislative with the executive, than a rejection of a proposed appointment." 272 U.S. at 121.

Construction Co. v. *Marathon Pipeline Co.*, 458 U.S. 50 (1982); and *Buckley* v. *Valeo*, 424 U.S. 1 (1976).[42]

Appellants now offer one case which they say supports choosing between constitutionally incompatible statutes; *Glidden* v. *Zdanock*, 370 U.S. 530 (1962, plurality opinion). CG Br. at 16-17; Sen. Br. at 34-5. In *Glidden*, the Court revisited the question of the Article III status of the Court of Claims and Court of Customs and Patent Appeals. The plurality and concurring opinions agreed that these courts had now become Article III courts. They rejected the argument that the courts' statutory authority to render advisory opinions destroyed the Article III status Congress had so clearly intended to create.

Contrary to appellants' assertion, the Court did not choose between constitutionally incompatible statutes. The plurality struck down neither (though it indicated how it *would* choose if it were necessary, 370 U.S. at 583), because it regarded the incompatible advisory opinion jurisdiction as so insignificant that it did not undermine the status of the Article III courts. Nor did the concurring Justices choose between the two statutes. Rather, they regarded the later statute which conferred Article III status on these courts as effectively voiding the earlier statute authorizing advisory opinions. *Id.* at 587. In other words, Congress had already made the choice. *Glidden* thus does not help appellants here.

Although the court below made it clear that it was inappropriate to consider invalidating the removal provision, it also made clear that, if it were free to choose and if congressional intent were the determinant, the Act's grant of powers would still have to fall. The court

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[42] The Comptroller General merely claims that these cases are irrelevant because "the asserted incompatibility existed within a single statute, not between the statute that the plaintiff[s] attacked and some other statute." CG Br. at 17, n.44. Besides the fact that no explanation is offered as to why a different rule should apply when two statutes, rather than one, are involved (in fact, the rule seems even more appropriate for separate statutes), two of those cases, *Springer* and *Myers*, concerned conflicts between statutes which were constitutionally incompatible with earlier statutes.

regarded it as doubtful that Congress would have chosen to give these powers to an official whom it could not remove. It noted that the House brief established clearly that a principal reason for granting this power to the Comptroller General was to avoid the perceived "pro-executive bias of the OMB." J.A. 60; *see also*, CG Br. at 39. As we have argued, Congress' ability to remove the Comptroller General is a key element of his independence from the President, and Congress regarded it as vital to retain that independence in this statute.

Moreover, to choose to invalidate the removal provision would inevitably alter the Comptroller General's relationship with Congress. It simply makes no sense to argue that it makes no difference to Congress or to the Comptroller General who has power to remove him. Removal by the President (or no removal at all) would unquestionably make him less dependent on Congress in form and in fact. Considering the close functional relationship between them, the many duties he performs of direct service to Congress, and the frequently adversarial relationship with the Executive Branch, described by the court below at J.A. 72-3, n.29, there is no reason to suppose that Congress would want to make such a fundamental change after 65 years of operation under existing assumptions. In addition, as the court below noted, there is no way to assess whether the Comptroller General's many powers would have been conferred on him at all if he were not removable by Congress. J.A. 60-61. Nothing in the legislative history or anywhere else suggests that Congress would tolerate such a change.[43]

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[43] The brief 1920 colloquy heavily relied upon by the appellants hardly "leaves no doubt" (CG Br. at 35) that Congress would have adopted the 1921 Act without the removal provision; to the contrary, it is clear that this isolated exchange carries no weight. The three congressmen involved essentially speculated as to the Act's fate if the Supreme Court found the removal provision invalid. Indeed, one participant, though he seemed to indicate a belief that a Court decision would not nullify the whole Act, admitted that he

There is simply no warrant, as appellants would have it, for assuming that congressional removal is of no consequence. On the contrary, the manner of removal was a bone of considerable contention in the 1921 Act, having been the subject of a veto by President Wilson, who believed the removal power should be his alone. Congress quite clearly went as far as it was prepared to go in agreeing to removal by joint resolution with the concurrence or over the veto of the President. It must be remembered that, even if Congress never expected to exercise the removal power, it did regard it as necessary to retain the power in order to keep it entirely out of the President's hands.

Finally, the existence of the fallback provision in the 1985 Act gives concrete guidance as to the choice between striking the powers or the removal. J.A. 60-61. Under the 1985 Act, we know quite clearly what Congress intended in the event part of the statute falls. We have no such advantage in the 1921 Act. Questions regarding how the Comptroller General could be removed (whether only by impeachment, or by the President, with or without cause), how the relationship between the Comptroller General and Congress would alter, and whether Congress would have wished to grant him the many powers it has if it did not possess the right to remove, can only be answered by speculating as to congressional intent. If the removal provision is to be rewritten, it is a job for Congress.

Neither does casting the question as one of "severability" help the appellants' argument; severability problems arise when a portion of a statute is held unconstitu-

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had not given the question "any consideration." 59 Cong. Rec. 8611 (remarks of Rep. Good) (1920). That Congress ultimately viewed the removal provision as critical is underscored by the fact that the 1921 Act retained such a provision despite President Wilson's veto and various legislative suggestions that the removal power be eliminated. Appellants' reliance on various forms of the statute which did not contain the removal authority, CG Br. at 37-38, is unavailing, since those proposals did not become law.

tional, so that one contemporaneous question of congressional intent exists.[44] The inherently difficult problems of reconstructing hypothetical congressional intent are staggering when two statutes, passed 65 years apart are unconstitutional in combination.

Under the appellants' analysis, the Court would have to decide that the Comptroller General's 1921 auditing and accounting duties were constitutionally incompatible with congressional removal at the outset. It would then have to decide, in the face of considerable evidence to the contrary, that the 1921 Congress would have preferred the Budget and Accounting Act without congressional removal had it known that the entire statute could not stand. Finally, it would have to decide that none of the powers granted the Comptroller General since 1921 (*see, e.g.*, CG Br. at 21-22, n. 55), including the very significant powers granted in the Gramm-Rudman Act, would have made any difference to the 1921 Congress, *and* that the 1985 Congress as well would have chosen to give the same power to an official whom it could not remove.

Apparently undaunted by this task, appellants ask this Court to sever congressional removal from the statute which created the position, in order to preserve duties conferred upon that office some 65 years later. The judicial surgery required by this task is simply too radical to be undertaken safely.

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[44] In *Regan* v. *Time Inc.*, —— U.S. ——, 104 S.Ct. 3262, 3269 (1984), relied on by the Senate, only one statute was involved; the same is true of the other leading severability cases: *Buckley v. Valeo*, 424 U.S. 1 (1976); *Champlin Refining Co. v. Corporation Commission*, 286 U.S. 210 (1932), and *United States* v. *Jackson*, 390 U.S. 570 (1968).

CONCLUSION

For all the foregoing reasons, the Act's automatic deficit reduction mechanism should be declared unconstitutional.

Respectfully submitted,

LOIS G. WILLIAMS *
Director of Litigation

GREGORY O'DUDEN
Assistant Director of Litigation

RICHARD S. EDELMAN
ELAINE D. KAPLAN
CARY P. SKLAR
Assistant Counsels

NATIONAL TREASURY
EMPLOYEES UNION
1730 K St., N.W., Suite 1101
Washington, D.C. 20006
(202) 785-4411

Counsel for Appellees,
National Treasury Employees Union, et al.

* Counsel of Record

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Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

HARRY R. VAN CLEVE
General Counsel

JAMES F. HINCHMAN
Deputy General Counsel

ROBERT P. MURPHY
Attorney-Adviser

U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548
(202) 275-5207

LLOYD N. CUTLER *
JOHN H. PICKERING
WILLIAM T. LAKE
RICHARD K. LAHNE
NEAL T. KILMINSTER

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for the Comptroller General of the United States

* Counsel of Record

April 16, 1986

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REPLY BRIEF FOR APPELLANT COMPTROLLER GENERAL OF THE UNITED STATES

In its brief for the United States, the Department of Justice puts forward two independent grounds, not adopted by the district court, for affirming the judgment below: It asserts that the Comptroller General is an "officer of the Legislative Branch" who cannot perform administrative functions for that reason alone, even if the removal provision is held invalid and severed from the 1921 Act.[1] It also asserts that *no* independent officer could perform the predictive factfinding functions assigned to the Comptroller General by the 1985 Act, because they can be performed only by officers removable at the pleasure of the President.[2]

Neither argument is correct. Moreover, the Department's defense of the ground the district court did adopt —that the 1985 delegation, rather than the 1921 removal provision, must be struck down—highlights the basic flaw in the district court's ruling. The Department's contention that the removal provision is "constitutionally defective in its own right," [3] if accepted, would make the 1921 removal provision a nullity that could have no bearing on the validity of the 1985 delegation.

I. THE COMPTROLLER GENERAL IS NOT A MERE LEGISLATIVE OFFICER BUT AN INDEPENDENT OFFICER OF THE UNITED STATES.

The Department asserts that the Comptroller General "uniformly has been regarded by all three Branches of Government . . . as an officer of the Legislative Branch" and that as such he cannot perform administrative functions.[4] On that view, Congress acted gratuitously in au-

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[1] Dept. Justice Br. at 9, 36-44.

[2] *Id.* at 9-11, 44-51.

[3] *Id.* at 9.

[4] *Id.*

thorizing the President to appoint the Comptroller General by and with the advice and consent of the Senate.[5]

The Department's contention is wholly inconsistent with the historical antecedents of the Comptroller General's office and with the understandings of the Congress in enacting the 1921 Act, of President Wilson in his 1920 veto message, and of this Court in *Myers v. United States*[6] when it quoted President Wilson's position with approval. As we have shown in our opening brief, the premise of the 1921 Act was to create the Comptroller General as an officer of the United States charged with administrative as well as legislative and judicial functions. The statute transferred to him all of the administrative and other functions previously performed in the Treasury Department by the Comptroller of the Treasury, an officer of the United States.[7] That is why Congress provided for appointment of the new officer by the President with the advice and consent of the Senate, as Article II requires. It was precisely because of the Comptroller General's status as a presidentially appointed officer of the United States charged with administrative functions that President Wilson objected to congressional participation in his removal, an objection that this Court, at the urging of Solicitor General Beck, expressly seconded in *Myers*.[8] After the veto, the House

[5] *Id.* at 37 n.22.

[6] 272 U.S. 52 (1926).

[7] Comp. Gen. Br. at 18-21; *see Ameron, Inc. v. United States Army Corps of Engineers*, Nos. 85-5226, 85-5377, slip op. at 5 (3d Cir. Mar. 27, 1986); *Globe Indemnity Co. v. United States*, 291 U.S. 476, 479-80 (1934). The Department thus misreads history in terming the Comptroller General "the Legislative Branch counterpart of the Director of the Bureau of the Budget." Dept. Justice Br. at 36. There was no legislative counterpart of the Bureau of the Budget (now OMB) until CBO was created by the Congressional Budget and Impoundment Control Act of 1974, tit. 2, Pub. L. No. 93-344, 88 Stat. 297, 302. *See, e.g.*, S. Rep. No. 579, 93d Cong., 1st Sess. 31 (Nov. 28, 1973).

[8] 272 U.S. at 52; *see* Substitute Brief for the United States on Reargument 94-101 (Apr. 13, 1925).

floor manager expressly agreed with President Wilson that "the officer we are creating here [is] an officer of the United States, and his appointment would have to fall under the provisions of Article II of section 2 of the Constitution." [9] Congress in 1921 disagreed only on what manner of removal the Constitution permitted for such an officer.

If the 1921 Act had created the Comptroller General as a merely legislative officer, there would have been no constitutional need or authority for the provision authorizing his appointment by the President.[10] There would have been no constitutional basis for President Wilson's objection to the removal provision or for this Court's approval of President Wilson's position in *Myers*.[11] Justices

[9] 59 Cong. Rec. 8612 (1920) (Rep. Good). Chief Justice Taft, testifying between his presidency and his appointment to the Supreme Court, agreed that presidential appointment was not gratuitous but essential: "There is no doubt you could create the officer, but, in view of the provision that the President appoints . . . officers of the United States, I doubt whether you could appoint him." *National Budget System: Supplement to Hearings Before the House Select Comm. on the Budget*, 66th Cong., 1st Sess. 479 (1919).

[10] The Constitution treats legislative officers very differently from officers of the United States. Each House "shall chuse" its own officers, U.S. Const. art. I, §§ 2(5), 3(5), without action by the President. *See Buckley v. Valeo*, 424 U.S. 1, 137-38 (1976) (per curiam). Members of Congress and legislative officers, unlike the Comptroller General and other officers of the United States, are not impeachable. *See, e.g.*, J. Story, *Commentaries on the Constitution of the United States* § 793 (Boston 1905); 3 A. Hinds, *Hinds' Precedents of the House of Representatives* §§ 2310, 2316, 2318 (1907).

[11] In addition to quoting from the Wilson veto message, 272 U.S. at 169, the majority held that the Tenure of Office Act of 1867 was unconstitutional "in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, . . . *and that subsequent legislation of the same effect was equally so.*" *Id.* at 176 (emphasis added). That reference plainly included the removal provision of the 1921 Act, which had been called to the Court's attention by counsel on both sides. *See* 272 U.S. at 62; Substitute Brief for the United States on Reargument 94-101 (Apr. 13, 1925).

Brandeis and McReynolds, in separate dissents joined by Justice Holmes, interpreted the majority ruling as invalidating the removal provision of the 1921 Act.[12] That could be so, of course, only if the Comptroller General is an officer of the United States charged with administrative duties. And the Department would have no basis for contending now that the removal provision is "constitutionally defective in its own right"[13] if the Comptroller General were not such an officer but were merely a legislative officer.[14]

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[12] 272 U.S. at 181-82 (McReynolds, J.); *id.* at 263-64 (Brandeis, J.). Professor Thomas Reed Powell reached the same conclusion. Powell, *Spinning Out Executive Power,* 48 New Republic 369 (1926).

[13] Dept. Justice Br. at 9.

[14] See Professor Powell's thoughtful 1920 article on President Wilson's veto message, concluding that the Comptroller General is an officer of the United States. Powell, *The President's Veto of the Budget Bill,* 9 Nat'l Mun. Rev. 538 (1920). The Comptroller General's status precisely fits the definition of an officer of the United States set forth in *Buckley v. Valeo*: "[A]ny appointee exercising significant authority pursuant to the laws of the United States is an 'Officer of the United States,' and must, therefore, be appointed in the manner prescribed by [the Appointments Clause]." 424 U.S. at 126; *see id.* at 131, 141. The Court observed that the Comptroller General, who "had significant duties" under the 1971 version of the 1974 statute at issue in *Buckley,* is so appointed. *Id.* at 128 n.165.

The Department finds support for the "legislative" character of GAO in the 1980 statute authorizing Congress to propose names to the President for appointment as Comptroller General. Dept. Justice Br. at 40-41; *see also* Synar Br. at 47; NTEU Br. at 40. But the Department misstates the effect of that statute. The 1980 law does not, as the Department implies, limit the President to names proposed by Congress. Congress in enacting that law accepted the Executive's view that the President must constitutionally "retain[] the sole authority of nomination, and may, in his discretion, select for appointment an individual whose name is not" on a recommended list in order to "preserve[] the President's authority under the Appointments Clause." S. Rep. No. 570, 96th Cong., 2d Sess. 10, *reprinted in* 1980 U.S. Code Cong. & Ad. News 732, 741; *see id.* at 14, 1980 U.S. Code Cong. & Ad. News at 745. The Executive had insisted on that prerogative precisely because the Comptroller General is an officer of the United States performing administrative functions, *see infra* p. 8; and it indicated to Congress its ac-

It is true, of course, that Congress, the courts, and commentators have frequently referred to the Comptroller General as "legislative" or as an "arm" or "agent" of Congress or the Legislative Branch. As we have shown, many of these references were intended to reflect the Comptroller General's independence of the Executive, just as those who attacked this independence, like Solicitor General Beck in *Myers*, claimed that the Comptroller General was performing "executive" functions and as an "executive" officer ought to be under the control of the President.[15] And these characterizations were made for purposes unrelated to the Comptroller General's constitutional status—indeed, most of them were made simultaneously with other congressional declarations of his "executive" status.[16] The most significant of the Comp-

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ceptance of the 1980 statute as consistent with its constitutional position. *E.g.*, *GAO Legislation: Hearings on S.1878 & S.1879 Before the Subcomm. on Energy, Nuclear Proliferation, and Federal Services of the Senate Comm. on Governmental Affairs*, 96th Cong., 1st Sess. 87 (1979) (Dep. Asst. Att'y Gen. Hammond) ("*1979 Senate Hearings*"); *General Accounting Office Act of 1979: Hearing on H.R. 24 Before a Subcomm. of the House Comm. on Government Operations*, 96th Cong., 1st Sess. 90 (1979) (OMB Dir. McIntyre) ("*1979 House Hearing*").

[15] *See* Comp. Gen. Br. at 26-27.

[16] For example, the "legislative" labels that the Department appears to find most significant—the Reorganization Acts of 1945 and 1949 (Dept. Justice Br. at 39)—are utterly devoid of constitutional significance. In 1932, President Hoover had proposed to emasculate GAO by transferring many of its duties to the Bureau of the Budget. F. Mosher, *The GAO: The Quest for Accountability in American Government* 86-88 (1979). Congress in 1945 and 1949 used the "legislative" label to prevent similar presidential efforts, as is explained in the Senate report on the 1945 statute. S. Rep. No. 638, 79th Cong., 1st Sess. 4-5 (1945). Eight days after the 1945 Act, Congress categorized GAO among the "Independent Executive Agencies" in other legislation. 59 Stat. 632, 635, 639 (1945). Three days after the 1949 statute, Congress categorized GAO among the "Independent Offices," 63 Stat. 231, 253 (1949), and two months later among the "executive bureaus, boards, commissions, corporations, agencies and offices," 63 Stat. 631, 644 (1949).

troller General's characteristics—independence from Congress, as well as from the executive—is reflected in this Court's most recent passing reference to GAO as "an independent agency within the Legislative Branch that exists in large part to serve the needs of Congress." [17] That description is not inconsistent with the Comptroller General's status as an independent officer of the United States charged with administrative functions in addition to his legislative and judicial duties.[18]

The other references cited by the Department are equally irrelevant to the constitutional issue here. The Department observes that the Comptroller General is required to report to Congress and assist it in other ways.[19] So, of course, are innumerable other independent officers and officers in the executive departments.[20] The Depart-

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[17] *Bowsher v. Merck & Co.*, 460 U.S. 824, 844 (1983).

[18] Congress has assigned administrative functions to other duly appointed officers of the United States sometimes associated with the Legislative Branch. *E.g.*, 2 U.S.C. § 136 (1982); 17 U.S.C. §§ 701(a), 702 (1982) (Librarian of Congress, appointed by President with advice and consent of Senate, oversees Copyright Office, including issuance of copyright regulations); 44 U.S.C. §§ 301, 1506 (1982 & Supp. II 1984) (Public Printer, appointed by President with advice and consent of Senate, has administrative functions); 40 U.S.C. §§ 13a, 13b, 13e, 162 (1982) (Architect of Capitol, appointed by President alone, has administrative functions).

Congress recognized that the administrative functions assigned to these officers necessitated that they be appointed as prescribed in the Appointments Clause. *See, e.g.*, 2 Cong. Rec. 3120 (1874) (remarks of Rep. Hale); 29 Cong. Rec. 386 (1896) (remarks of Rep. Cannon). The Department's argument apparently would invalidate these officers' performance of administrative functions. Rejecting a similar argument, the Fourth Circuit has upheld the Librarian's administration of the copyright laws on the ground that he is a duly appointed officer of the United States. *Eltra Corp. v. Ringer*, 579 F.2d 294, 300 (4th Cir. 1978).

[19] Dept. Justice Br. at 38.

[20] Reporting responsibilities have been imposed on officers of the United States since the beginning of the Republic. *E.g.*, Act of Sept. 2, 1789, ch. 12, § 2, 1 Stat. 65, 66 (current version at 31 U.S.C. § 331(d) (1982)) (Secretary of Treasury required to report to

ment notes that GAO's appropriations are currently included among those of the Legislative Branch.[21] It does not mention that GAO's appropriations were included among the "independent executive" agency appropriations by the Congress that enacted the 1921 Act and by all subsequent Congresses until they found their way into "legislative" appropriations in 1964.[22] The Department finds significance in the requirement that the President forward GAO's budget estimates to Congress without change.[23] But many other independent agencies have the same protection, while still others are authorized to submit their requests to Congress directly.[24]

Moreover, the Department's asserted "uniform[ity]" of characterization disregards the numerous instances—some mentioned in our opening brief—in which all three Branches have characterized the Comptroller General as

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either House of Congress on request). Current examples include: 15 U.S.C. § 1519 (1982) (Secretary of Commerce); 2 U.S.C. § 475(d) (1982) (executive departments or agencies required to furnish information to Office of Technology Assessment); 29 U.S.C. § 6 (1982) (Bureau of Labor Statistics). The Department fails to note that the same section of the 1921 Act on which it relies requires the Comptroller General also to make reports to the President. 1921 Act § 312(a), J.A. 98.

[21] Dept. Justice Br. at 39-40.

[22] *See, e.g.*, 42 Stat. 635, 640 (1922); 42 Stat. 1227, 1231 (1923). GAO's appropriations were again included among the "independent executive agencies" in 1965 and 1966. For a list of the relevant appropriations bills from 1922-69, see Appendix A.

[23] Dept. Justice Br. at 40; *see* Synar Br. at 47.

[24] *See* 39 U.S.C. § 2009 (1982) (U.S. Postal Service); 19 U.S.C. § 2232 (1982) (International Trade Commission); 31 U.S.C. § 1108(f) (1982) (Interstate Commerce Commission); 15 U.S.C. § 2076(k)(1) (1982) (Consumer Product Safety Commission); 7 U.S.C. § 4a(h)(1) (1982) (Commodities Futures Trading Commission); 2 U.S.C. § 437d(d)(1) (1982) (Federal Election Commission); 49 U.S.C. § 1903(b)(7) (1982) (National Transportation Safety Board); 5 U.S.C. § 1205(j) (1982) (Merit Systems Protection Board); *cf.* 42 U.S.C. § 7171(j) (1982) (Federal Energy Regulatory Commission).

an executive officer or as an officer of the United States. The Senate sponsors of the final 1985 Act described the Comptroller General as an "executive" officer and proposed him for his role under the statute precisely because of that status.[25] The Department itself has joined in that characterization, as early as Solicitor General Beck's 1925 assertion in his brief in *Myers* that the removal provision is invalid because the Comptroller General is an "official of the executive department" [26] and as recently as 1979. When the possibility arose in the 1970s that Congress might authorize itself to appoint the Comptroller General, a Department spokesman responded:

> "You can't do that. You could do it if the General Accounting Office were an agency that only performed legislative functions. But there are a number of responsibilities that GAO now has and I am sure it would want to retain that are really executive in nature—their enforcement of a variety of programs that come within what is customarily thought of as execution of the laws.
>
> "If that is the case, then the head of that department has to be selected in a way consistent with the appointments clause of the Constitution." [27]

The Department also has published its opinion that the GAO is an "independent agency of the United States" for purposes of Title V of the Ethics in Government Act, which punishes conflict of interest violations by officers "of the executive branch of the United States Govern-

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[25] *See* Comp. Gen. Br. at 40 & n.118; *see also supra* note 16.

[26] *See* Comp. Gen. Br. at 27, 47.

[27] *1979 Senate Hearings* at 77 (Dep. Asst. Att'y Gen. Hammond); *accord 1979 House Hearing* at 96 (OMB Dir. McIntyre); *Strengthening Comptroller General's Access to Records; New Procedure for Appointment: Hearings on H.R. 12171 Before a Subcomm. of the House Comm. on Government Operations,* 95th Cong., 2d Sess. 56, 77-79 (1978) (Dept. Asst. Att'y Gen. Hammond); *cf. id.* at 47-48 (Comp. Gen. Staats). Congress accepted that view. *See supra* note 14.

ment, [and] of any independent agency of the United States." [28]

The courts too have recognized that the Comptroller General has administrative or "executive" functions and —except for the decision below—have uniformly upheld his capacity to perform them.[29] And the very scholars who the Department asserts have "recognized the position of the Comptroller General within the Legislative Branch" in fact mostly disagree with the Department's position here.[30]

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[28] 3 Op. Off. Legal Counsel 433, 433, 436 (1979) (construing 18 U.S.C. § 207).

[29] *Ameron, supra* (criticizing the decision below), *aff'g*, 607 F. Supp. 962 (D.N.J. 1985); *Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN (C.D. Cal. Nov. 21, 1985); *see United States ex rel. Brookfield Construction Co. v. Steward*, 234 F. Supp. 94, 99-100 (D.D.C.), *aff'd*, 339 F.2d 753 (D.C. Cir. 1964) (Comptroller General performs "executive" as well as "legislative" functions, in same manner as other independent agencies); *Lawrence v. Staats*, 665 F.2d 1256, 1258 (D.C. Cir. 1981) ("GAO [is] an executive agency as defined in 5 U.S.C. § 105"); *Williams v. Phillips*, 360 F. Supp. 1363, 1370 (D.D.C. 1973) (GAO is among the "Executive agencies not contained within the Executive departments"); *cf. Buckley v. Valeo*, 424 U.S. at 128 n.165. *But cf. Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 201 n.1 (D.C. Cir. 1984).

[30] Dept. Justice Br. at 43 n.30. The first work the Department cites is a 1929 article that concluded from the 1921 Act and its legislative history that the Comptroller General is an executive officer and that the 1921 Act's removal provision is void under *Myers*. Langeluttig, *Legal Status of the Comptroller General of the United States*, 23 Ill. Rev. 556, 582-83, 586 (1929). Another work simply characterizes the Comptroller General as an "agent" of Congress and then demonstrates that he is indistinguishable in this respect from the Federal Trade Commission and is thus covered by *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L.Q. 215, 240 (1936). Mosher notes that Congress has characterized GAO as "legislative" in exempting that agency from the President's reorganization power. But he goes on to observe that the Comptroller General in his nonlegislative functions "is an independent officer of the United States, substantially independent of either branch." F. Mosher,

In any event, this Court properly has avoided "the tyranny of labels." [31] In *Humphrey's Executor* and subsequent decisions, the Court has recognized that independent officers of the United States usually perform functions that appertain to more than one Branch, and it has determined the constitutional capacity of such officers from their manner of appointment, tenure, and functions.[32]

In upholding the power of independent officers properly appointed under the Appointments Clause to perform administrative along with legislative and judicial functions, the Court has not found it necessary to pigeonhole each independent officer within a single Branch of the Government. In *Humphrey's Executor*, the members of the Federal Trade Commission, while "wholly disconnected from the executive department" (except for their appointment), were termed "an agency of the legislative and judicial departments" [33]—a characterization that belies the Justice Department's notion that every officer must be categorized on an either/or basis like male or female. In *Wiener*, the War Claims Commission was found to be independent of "either the Executive or the Congress" [34] in performing its judicial functions, but it was not categorized as within any one of the three Branches. In *Buckley*, the mixed functions of the Fed-

The GAO: The Quest for Accountability in American Government 104-05, 242 (1979). The Department does not cite Professor Powell's 1920 article, *supra* note 14, concluding that the Comptroller General is an officer of the United States.

[31] *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (Cardozo, J.).

[32] *See Buckley v. Valeo*, 424 U.S. at 137-41; *Wiener v. United States*, 357 U.S. 349, 353-56 (1958); *Humphrey's Executor*, 295 U.S. at 628, 631-32; *cf. Glidden Co. v. Zdanok*, 370 U.S. 530, 552-61, 572-83 (1962). Both the majority and concurring opinions in *Ameron, supra*, recognize the mixture of functions that independent officers of the United States commonly perform.

[33] 295 U.S. at 630.

[34] 357 U.S. at 355-56.

eral Election Commission were found to include enough administrative duties to require that its members be duly appointed officers of the United States, and the Commission was compared to other independent regulatory agencies whose members the President had no right to remove at will, but it was not classified as belonging to any particular Branch.[35]

As Justice Sutherland noted in *Springer*, in a passage quoted twice in *Buckley*, "while the legislature cannot engraft executive duties upon a legislative office[r]" appointed by the legislature, "the case might be different if the additional duties were devolved upon an appointee of the executive." [36] Accordingly, so long as an official whose functions appertain in some respects to the Legislative Branch is a properly appointed officer of the United States, this Court has not denied him the constitutional capacity to perform administrative functions.[37]

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[35] 424 U.S. at 140-41.

[36] *Springer v. Government of the Philippine Islands*, 277 U.S. 189, 202 (1928), *quoted in Buckley*, 424 U.S. at 136, 139.

[37] The congressional appellees argue that, regardless of the constitutional capacity of the Comptroller General, the 1985 Act is invalid because he "shares" the administration of the Act with the Director of CBO, a mere legislative officer. Synar Br. at 42-48. That argument is no more correct than the "rubber stamp" argument they made below, which the district court rejected in a footnote. J.A. 55 n.18. The Act is clear in giving the Comptroller General the factfinding authority and the Directors of OMB and CBO merely advisory roles, as the Department of Justice recognizes in attacking the delegation to the Comptroller General. *See* Dept. Justice Br. at 27-28. The Comptroller General's affidavit makes clear that he understands that the Act gives him, and not the Directors, the duty to make the statutory findings. J.A. 21-25. His initial report disagreed with the Directors' positions on a number of issues; and he found it unnecessary to resolve other issues relating to their economic forecasts because the statutory cap on sequestrations in 1986 rendered those issues moot. *See* GAO, Budget Reductions for FY 1986, Report to the President and Congress, 51 Fed. Reg. 2811, 2813-14 (1986).

II. THE FACTFINDING DUTIES ASSIGNED TO THE COMPTROLLER GENERAL BY THE 1985 ACT ARE NOT REQUIRED TO BE DELEGATED TO AN OFFICER REMOVABLE AT THE PLEASURE OF THE PRESIDENT.

The Department argues that the duties assigned to the Comptroller General by the 1985 Act can be delegated only to an officer removable at the pleasure of the President.[38] That position, which goes beyond the decision below, is contrary to almost a century of constitutional history. Its adoption would bring an end not only to the important independent functions of the Comptroller General but also to the principal functions of a host of other independent agencies.[39]

The authorities cited by the Department provide little support for its view. The Decision of 1789 establishes at most that the Secretary of State and comparable officers must be removable at the President's will.[40] And *Myers*, after *Humphrey's Executor*, stands only for the proposition that there are some "purely executive officers" who must be so removable.[41] *Myers* does not say what officers or functions besides the Secretary of State and his broad foreign affairs duties fall within that category.[42]

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38 Dept. Justice Br. at 44-51.

39 Appendix B sets forth statutory provisions relating to the appointment, tenure, and responsibilities of a number of officers who perform administrative functions and enjoy some degree of protection against removal at the pleasure of the President.

40 *See* Dept. Justice Br. at 21-23. Historians have concluded that a majority of the first Congress did not subscribe even to that proposition. *E.g.*, Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 360-62 (1927).

41 *Myers* may establish also that Congress is forbidden to participate in the removal of an officer of the United States. *See infra* Part III.

42 As we have noted, postmasters before and since *Myers* have been transferred out of the "purely executive" category without constitutional challenge. *See* Comp. Gen. Br. at 46-47.

The Department apparently concedes that Congress can "immunize" an "inferior Officer" from presidential removal. Dept. Justice

Only a week after the Decision of 1789, Madison expressed the insight that protection against removal at will is appropriate for officers whose responsibilities appertain to more than one Branch, when he argued with respect to the Comptroller General's predecessor, the Comptroller of the Treasury, that "an officer of this kind should not hold his office at the pleasure of the executive branch of the Government" and that "the legislative power is sufficient to establish this office on such a footing as to answer the purposes for which it is prescribed." [43]

The Department acknowledges that *Humphrey's Executor* upheld the power of Congress to create independent officers of the United States removable by the President only for cause. But it appears to argue that such officers may perform only "quasi-judicial" functions, which the Department defines narrowly as "find[ing] historical facts pertaining to a particular person or transaction and render[ing] a decision regarding the legal consequences of past conduct." [44] An independent officer cannot, on that view, be empowered to take civil enforcement action, to make predictive findings, or to adopt substantive rules to carry out the responsibilities assigned him by statute.[45] That position is inconsistent with *Humphrey's Executor*

Br. at 25-26 n.16. However, it asserts that "there can be no serious contention . . . that the Comptroller General . . . is an 'inferior officer.'" *Id.* To the contrary, both President Wilson and the congressional sponsors of the 1921 Act considered the Comptroller General to be an "inferior Officer." *See* 59 Cong. Rec. 8609 (1920); 61 Cong. Rec. 982 (1921); *cf. id.* at 1856-57 (Reps. Denison and Byrns); *Myers*, 272 U.S. at 204 (McReynolds, J., dissenting) (equating superior officers with members of the cabinet). Professor Powell shared that view. Powell, *supra* note 14, 9 Nat'l Mun. Rev. at 539.

[43] 1 Annals of Cong. 635-36 (1789) (J. Gales ed. 1834); *see* Comp. Gen. Br. at 21.

[44] Dept. Justice Br. at 10; *see id.* at 46.

[45] *See id.* at 10, 45-47.

and other decisions and would, if accepted, invalidate the charters and functions of many independent agencies.

The Department's crabbed reading of *Humphrey's Executor* ignores the point that the FTC had then and still has administrative duties that cannot be squeezed within the Department's narrow "quasi-judicial" category.[46] This Court recognized that the FTC had direct enforcement powers under Section 5 of the Federal Trade Commission Act.[47] The FTC had (and still has) authority under the Clayton Act to make predictive findings that proposed mergers "may . . . substantially lessen competition or tend to create a monopoly" and the power to enforce those findings through administrative orders and injunctive suits in federal courts.[48]

There is nothing unique about the Comptroller General's responsibility to make predictive findings of fact under the 1985 Act. Among the many independent agencies whose statutory responsibilities involve making broad predictive findings of fact are the Governors of the Federal Reserve Board in establishing the discount rate, regulating open-market transactions, and setting standards for bank holding company financial structures and reserves;[49] the Interstate Commerce Commission, the Federal Communications Commission, the Federal Reserve Board, and (as noted above) the FTC in enforcing

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[46] *See* Comp. Gen. Br. at 43; *see also Buckley v. Valeo,* 424 U.S. at 141.

[47] *See* Comp. Gen. Br. at 42-44.

[48] Clayton Act §§ 2, 3, 7, 11, ch. 323, 38 Stat. 730, 730-32, 734 (1914) (codified at 15 U.S.C. §§ 13, 14, 18, 21).

The Department grudgingly acknowledges in a footnote that "agencies such as the FTC often perform functions that are indistinguishable from the enforcement of the law undertaken by executive departments." Dept. Justice Br. at 46 n.32. What it does not acknowledge are the implications of that practice, and of this Court's decisions upholding the practice.

[49] 12 U.S.C. §§ 263, 357, 461 (1982).

the antimerger provisions of the Clayton Act;[50] the International Trade Commission in finding threatened injury to a domestic industry from imports;[51] the Federal Communications Commission in allocating radio frequencies and "deregulating" common carriers;[52] the Securities and Exchange Commission and the Commodities Futures Trading Commission in making rules as to commission rates, tender offers, disclosure by issuers, and the conduct of securities markets;[53] the Consumer Product Safety Commission in setting product safety standards;[54] the Nuclear Regulatory Commission in setting safety standards and issuing licenses to build and operate nuclear power plants;[55] the Federal Energy Regulatory Commission in issuing licenses for interstate gas pipelines and for importation and exportation of natural gas and in ordering interconnection of transmission lines;[56] and the Interstate Commerce Commission in regulating railroad and trucking rates and issuing common carrier licenses.[57] On the Department's reading, *Hum-*

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[50] 15 U.S.C. §§ 13, 14, 18, 21 (1982 & Supp. II 1984).

[51] 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d, 2251 (1982 & Supp. II 1984).

[52] *E.g.*, 47 U.S.C. §§ 307(a), 309(a) (1982) (radio licensing); *Policy & Rules Concerning Rates for Competitive Common Carrier Services & Facilities* (First Report & Order), 85 F.C.C.2d 1 (1980) (common carrier deregulation); *see FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 813-14 (1978) (FCC often must determine "the direction in which future public interest lies").

[53] *E.g.*, 15 U.S.C. §§ 77j(c), 77s(a), 78f(a),(e)(1)-(2), 78j, 78k-1(a)(2),(c), 78n(a),(b),(d)(1),(4),(5), 78o(a), 78q-1(d)(1), 78s(c), 78w(a)(1),(2) (1982 & Supp. II 1984) (SEC); 7 U.S.C. §§ 6a(1), 6c(e) (1982) (CFTC).

[54] 15 U.S.C. § 2056(a) (1982).

[55] 42 U.S.C. §§ 2133, 2201(b) (1982).

[56] 15 U.S.C. §§ 717b, 717f (1982); 42 U.S.C. § 7172(a) (1982); *see FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 29 (1961) (upholding predecessor of FERC in forecasting "the direction in which future public interest lies").

[57] *E.g.*, 49 U.S.C. §§ 10704, 10901-03 (1982); *see United States v. Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241 (1945)

phrey's Executor would not allow Congress to enact laws delegating these functions to independent officers of the United States protected against removal by the President at will.

The Department's contention thus threatens the status and functions of a considerable number of independent officers and agencies in addition to the Comptroller General, just as was true of the Government's argument rejected in *Humphrey's Executor.* The Court there noted that "[t]he Solicitor General, at the bar, . . . with commendable candor, agreed that his view in respect of the removability of members of the Federal Trade Commission necessitated a like view in respect of the Interstate Commerce Commission and the Court of Claims." [58] This Court expressly rejected Solicitor General Reed's invitation as to the Federal Trade Commission and the Interstate Commerce Commission, both of which then performed (and still perform) functions that require making broad predictive findings of fact. This Court should now reject this renewed invitation as to the Comptroller General and all the other independent officers of the United States whose functions would otherwise be struck down.[59]

(holding that "[f]orecasts as to the future are necessary" in ICC application of public interest standard).

[58] 295 U.S. at 629.

[59] The Department's assertion that the Comptroller General's duties under the 1985 Act are unusually "sweeping," Dept. Justice Br. at 48, 51, 51 n.33, is answered by the district court's observations that "the *only* discretion conferred is the ascertainment of facts and the prediction of facts" and that the Comptroller General "is not made responsible for a single *policy* judgment." J.A. 51 (emphasis in original). The Department's contention cannot be squared with its own argument, successful below, that the delegation to the Comptroller General complies with the delegation doctrine because it has been thus narrowly circumscribed.

We agree with the court below that the 1985 Act does not involve an unconstitutional delegation of power, and we join the reply brief of the Senate on that issue.

The Department also argues that the functions delegated by the 1985 Act have the particular vice of resulting in findings that "are binding upon the President and, through him, the heads of the executive departments and agencies." [60] But that is the result of the Act, as is generally true when an independent officer performs a statutory function.[61] The Executive is bound by and must act on the personnel decisions of the Merit Systems Protection Board; [62] the "injury" determinations of the International Trade Commission; [63] the regulations of the Federal Reserve Board under the Truth in Lending Act; [64] the orders of the Federal Labor Relations Authority with respect to executive agency labor practices and collective bargaining; [65] the rulings of the Consumer Product Safety Commission with respect to products that must be refused admission into the United States; [66] the decisions of the National Transportation Safety Board on review of actions by the Secretary of Transportation with respect to operating certificates or licenses; [67] the common carrier

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[60] Dept. Justice Br. at 10.

[61] The Department suggests that the Comptroller General is given the authority to "direct the execution of the laws by the President." *Id.* at 48. But it is the 1985 Act, not the Comptroller General, that directs the President to sequester funds in accordance with the Act's provisions. *Cf. United States v. Grimaud*, 220 U.S. 506, 510, 515, 522-23 (1911).

[62] 5 U.S.C.A. § 1205(a)(2) (West Supp. 1986); *see Kerr v. National Endowment for the Arts*, 726 F.2d 730, 733 (Fed. Cir. 1984).

[63] 19 U.S.C. §§ 1671b, 1671d, 1673b, 1673d, 2251-52 (1982 & Supp. II 1984).

[64] 15 U.S.C. § 1607(a) (1982); *see* Comp. Gen. Br. at 44-46.

[65] 5 U.S.C. §§ 7104-05 (1982 & Supp. II 1984); *see id.* § 7101 note, Ex. Order 11491; *NTEU v. FLRA*, 732 F.2d 703 (9th Cir. 1984); *AFGE v. FLRA*, 716 F.2d 47, 50 (D.C. Cir. 1983); *IRS v. FLRA*, 671 F.2d 560, 561 (D.C. Cir. 1982).

[66] 15 U.S.C. § 2066 (1982).

[67] 49 U.S.C. § 1903(a)(9) (1982).

rate decisions of numerous independent regulatory agencies on services purchased by the Executive;[68] and, since 1921, the decisions of the Comptroller General on Executive Branch accounting standards and on the settlement of Executive Branch disbursement accounts.[69] In short, the Department's declaration that, where a law imposes responsibilities on the President, he has the "right . . . to make any necessary legal or factual determinations that Congress has not resolved in the statute itself"[70] is at odds with the reality of existing administrative practice and the practicalities of modern government. If the delegation of a particular function to an independent officer is otherwise valid, the binding effect of his decisions on the Executive is not a ground for voiding the delegation.[71]

The role assigned to the Comptroller General in the 1985 Act was a compromise arising out of the unwillingness of the House to delegate the factfinding responsibility to the President's agent, the Director of OMB, and the unwillingness of the Senate and the Executive (for

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[68] *See, e.g., AT&T (TELPAK Service)*, 38 F.C.C. 370, 374-75, 382, 387-90, *aff'd*, 37 F.C.C. 1111 (1964), *recon. denied*, 38 F.C.C. 761 (1965).

[69] Budget & Accounting Act of 1921, § 309, ch. 18, 42 Stat. 20, J.A. 96 (current version at 31 U.S.C. § 3511(c) (1982)). The courts also may issue orders requiring particular action by the President and other Executive Branch officers. *See United States v. Nixon*, 418 U.S. 683, 714 (1974) (upholding district court subpoena issued to President); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 584, 589 (1952) (upholding district court order enjoining Secretary of Commerce from carrying out Executive Order issued by President).

[70] Dept. Justice Br. at 50.

[71] Congress considered the President's role in issuing the order to be largely a formality. *See* 131 Cong. Rec. S12,645-46 (daily ed. Oct. 4, 1985) (Sen. Boren); *id.* at S12,703 (Sen. Rudman); *id.* at S12,670 (Sen. Rudman). Senators Boren and Gramm discussed similar procedures used in Oklahoma and Texas. *Id.* at S12,645, S12,647. Senator Gramm stated that such procedures are used in 43 states. *Id.* at S12,645.

constitutional reasons, among others) to see that responsibility delegated to a legislative officer, the Director of CBO.[72] The solution, not unlike that adopted in many previous disputes between the two Branches, was to delegate a responsibility arguably appertaining to both Branches to an officer of the United States substantially independent of either. The Department's extreme view that the Constitution, except for its expressly enumerated instances, bars any such "involvement by one Branch in the affairs of another," [73] would put an end not only to this innovative experiment but also to the century-old concept of the independent agency. Indeed, the Department's view, taken literally, would even encompass any delegation to executive departments of substantive rulemaking authority (a "legislative" function)—a practice the Department naturally defends.[74] No decision of this Court interprets the doctrine of separation of powers with such stultifying either/or rigidity.

III. IF THE CONSTITUTION FORBIDS CONGRESSIONAL INVOLVEMENT IN REMOVAL OF AN OFFICER OF THE UNITED STATES, THEN THE 1921 REMOVAL PROVISION HAS BEEN VOID FROM THE OUTSET AND HAS NO BEARING ON THE VALIDITY OF THE 1985 ACT.

The Department's defense of the ruling below actually highlights the error in that ruling. The Department argues, in effect, that the 1921 removal provision is void on its face. If so, then it is and has always been a nullity,

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[72] *See* Comp. Gen. Br. at 39; *see also* 131 Cong. Rec. S13,113 (daily ed. Oct. 10, 1985) (Senate Minority Leader Byrd) ("The Administration can . . . manipulate when the automatic cuts will go into effect if [OMB] cooks the numbers."); *id.* at S12,701 (Oct. 5) (Sen. Hart) (OMB "cooks its books regularly"). For a confirmation of the congressional suspicion that the Director of OMB was "cooking the books," see David Stockman's vivid confessions about "Rosy Scenario" in the excerpts from *The Triumph of Politics* published in Newsweek, April 21, 1986, at 52-59.

[73] Dept. Justice Br. at 14.

[74] *See id.* at 46 n.32.

and the district court erred in invoking that nullity to strike down the 1985 delegation of functions.

The Department reads *Myers* to establish that the Constitution forbids any congressional role in the removal of any officer of the United States, except by impeachment.[75] Our position is that, in the case of independent officers, Congress may play such a role under a statute authorizing removal by new legislation after hearing for cause. While *Myers* involved a "purely executive" officer, we recognize that the majority opinion can be read to bar any congressional role in the removal of any presidential appointee and that the Court in *Myers* was aware of the 1921 removal provision for the Comptroller General.[76] This aspect of *Myers* was not touched by *Humphrey's Executor* or *Weiner*, neither of which involved a statute asserting a congressional role in the removal process.

If the Department's reading of *Myers* is correct, the inescapable conclusion is that the 1921 removal provision is and always has been a nullity. Indeed, this was the position advocated by Solicitor General Beck.[77] The Department struggles to avoid this logical consequence of its own constitutional position, but without success. It cites the removal provision as evidence defining the Comptroller General as a purely legislative official.[78] But this

[75] "[The Impeachment Clause] negates any implication of a power in Congress to vest itself (or either of its Houses) with the authority to remove any [civil officer of the United States] in some other manner or for some other reason." Dept. Justice Br. at 19-20; *see id.* at 9, 30-31.

[76] *See supra* pp. 2-4 & n.11.

[77] Mr. Beck not only urged the unconstitutionality of the 1921 removal position, but he also regarded it as severable. He argued that, after President Wilson's veto, President Harding had signed the 1921 Act "only because he was indisposed to defeat the whole budget law because of *one* provision, and he presumably felt that the constitutionality of *that* provision would be determined in due course." Substitute Brief for the United States on Reargument 96 (Apr. 13, 1925) (emphasis added), *Myers v. United States*.

[78] Dept. Justice Br. at 36-37.

attempt to make the tail wag the dog must fail, since Congress plainly intended the Comptroller General to be an officer of the United States capable of performing administrative functions, and since President Wilson and the entire Court in *Myers* plainly agreed that he was such an officer.[79] If the 1921 removal provision is incompatible with the status Congress intended for the Comptroller General, then there is no avoiding the issue whether that provision is unconstitutional and severable from the rest of the 1921 Act.

The Department defends the district court's refusal to consider the constitutionality of the removal provision as a part of the 1921 Act, but does appear to concede that the reason given by the district court was wrong. The Department recognizes that this Court in *Glidden* said that the statutes the Court found to be "inconsistent with the Tribunal's constitutional status" would have to fall, even though they were not the statutes that, in the district court's words, "either allegedly prohibit[] or allegedly authorize[] the injury-in-fact that confers standing upon the plaintiff."[80] *Glidden* applied the accepted principle that an asserted constitutional incompatibility between two statutes, like other severability issues, should be resolved in the manner that best achieves congressional intent. The district court did not follow that principle, but used the 1921 removal provision as a sword to strike down the 1985 delegation without even considering the constitutionality and severability of the 1921 removal provision in the context of the 1921 Act.

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[79] *See supra* pp. 2-4.

[80] Dept. Justice Br. at 56 n.36; *see* NTEU Br. at 44; J.A. 60. The Department asserts that "there was no majority of the Court on the severability issue" in *Glidden*. That is incorrect. Justice Clark and Chief Justice Warren agreed with the plurality in concluding that the earlier jurisdictional statutes were invalid and that the courts should, "if and when such a case arose, . . . refuse to exercise such jurisdiction." 370 U.S. at 589 (footnote omitted); *see id.* at 587. *See also Ex Parte Bakelite Corp.*, 279 U.S. 438, 460 (1929).

The fallback mechanism in the 1985 Act, on which the Department places great reliance, is irrelevant to the severability of the removal provision from the 1921 Act. If the Department is correct in urging that the removal provision is invalid under *Myers*, that provision cannot affect the validity of a statute enacted 65 years later delegating an additional function to the Comptroller General. The fallback mechanism by its terms comes into play only "[i]n the event that any of the reporting procedures described in section 251 are invalidated." [81] There is no invalidity in the 1985 delegation of the reporting function to the Comptroller General, because either the 1921 removal provision is permissible for an officer of the United States performing administrative functions or it is not; if it is not, it has been void since 1921 and is severable from the 1921 Act. In either event, it cannot affect the validity of the 1985 Act.

The Department is asserting, in effect, that the existence of the fallback provision in the 1985 Act is itself a ground for invalidating the reporting mechanism. That is a result Congress obviously did not intend.

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[81] 1985 Act § 274(f)(1), J.A. 165.

CONCLUSION

For the reasons stated above and in our opening brief, the judgment of the district court should be reversed.

Respectfully submitted,

HARRY R. VAN CLEVE
General Counsel

JAMES F. HINCHMAN
Deputy General Counsel

ROBERT P. MURPHY
Attorney-Adviser

U.S. General Accounting Office
441 G Street, N.W.
Washington, D.C. 20548
(202) 275-5207

LLOYD N. CUTLER *
JOHN H. PICKERING
WILLIAM T. LAKE
RICHARD K. LAHNE
NEAL T. KILMINSTER

WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006
(202) 872-6000

Attorneys for the Comptroller General of the United States

* Counsel of Record

April 16, 1986

APPENDICES

APPENDIX A

APPROPRIATIONS STATUTES 1922-1969, WITH INDICATION OF CATEGORY WITHIN WHICH GAO FUNDS APPEAR

1922 42 Stat. 635, 640 ("independent executive bureaus, boards, commissions, and offices").

1923 42 Stat. 1227, 1231 (same).

1924 43 Stat. 521, 525 (same).

1925 43 Stat. 1198, 1203 (same).

1926 44 Stat. 305, 311 (same).

1927 44 Stat. 1069, 1075 (same).

1928 45 Stat. 573, 579 (same).

1929 45 Stat. 1230, 1237 (same).

1930 46 Stat. 229, 236 (same).

1931 46 Stat. 1355, 1363 (same).

1932 47 Stat. 452, 460 (same).

1933 48 Stat. 283, 291 (same).

1934 48 Stat. 509, 514 (same).

1935 49 Stat. 6, 11 (same).

1936 49 Stat. 1167, 1173 (same).

1937 50 Stat. 329, 335 (same).

1938 52 Stat. 410, 417 (same).

1939 53 Stat. 524, 532 (same).

1940 54 Stat. 111, 131 (same).

1941 55 Stat. 92, 112 (same).

1942 56 Stat. 392, 411 (same).

1943 57 Stat. 169, 181 (same).

1944 58 Stat. 361, 371 (same).

1945 59 Stat. 106, 118 (same).

1946 60 Stat. 60, 70 (same).

1947 61 Stat. 585, 598 (same).

1948 62 Stat. 176, 187 (same).

1949 63 Stat. 631, 644 ("independent executive bureaus, boards, commissions, corporations, agencies, and offices").

1950 64 Stat. 595, 697, 704 ("Executive and Independent Offices").

1951 65 Stat. 268, 274 ("independent executive bureaus, boards, commissions, corporations, agencies, and offices").

1952 66 Stat. 393, 399 (same).

1953 67 Stat. 298, 302 (same).

1954 68 Stat. 272, 280 (same).

1955 69 Stat. 199, 202 (same).

1956 70 Stat. 339, 342 (same).

1957 71 Stat. 227, 229 (same).

1958 72 Stat. 1063, 1066 (same).

1959 73 Stat. 500, 504 (same).

1960 74 Stat. 425, 430 (same).

1961 75 Stat. 342, 348 (same).

1962 76 Stat. 716, 722 (same).

1963 77 Stat. 425, 431 (same).

1964 78 Stat. 535, 550 ("Legislative Branch").

1965 79 Stat. 520, 526 ("independent executive bureaus, boards, commissions, corporations, agencies, and offices").

1966 80 Stat. 663, 669 (same).

1967 81 Stat. 127, 141 ("Legislative Branch").

1968 82 Stat. 398, 412 (same).

1969 83 Stat. 338, 358 (same).

APPENDIX B

STATUTORY PROVISIONS RELATING TO SELECTED INDEPENDENT AGENCIES

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Commodities Futures Trading Commission	Independent agency of the United States Government. 7 U.S.C. section 4a(a)(1).	By President with advice and consent of Senate. 7 U.S.C. section 4a(a)(1).	Five-year term, 7 U.S.C. section 4a(a)(1). Chairman chosen among Commissioners by President with advice and consent of Senate, and serves as Chairman at pleasure of President. *Id.* section 4a(a)(2).	*E.g.*, 7 U.S.C. sections 6, 6a, 6b, 6c, 21, 23.	*E.g.*, 4 U.S.C. sections 9, 126, 13a-1, 13b, 21.
Consumer Product Safety Commission	Independent regulatory commission. 15 U.S.C. section 2053(a).	By President with advice and consent of Senate. 15 U.S.C. section 2053(a).	Seven-year term, 15 U.S.C. section 2053(b)(1). Removal by President for "neglect of duty or malfeasance in office, but for no other cause." *Id.* section 2053(a).	*E.g.*, 15 U.S.C. sections 2056, 2057, 2063.	*E.g.*, 15 U.S.C. sections 2057, 2061, 2064, 2069, 2076.

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Copyright Royalty Tribunal	Independent tribunal in the Legislative Branch. 17 U.S.C. section 801(a).	By President with advice and consent of Senate. 17 U.S.C. section 802(a).	Seven-year term. 17 U.S.C. section 802(a).		
Equal Employment Opportunity Commission	(Silent)	By President with advice and consent of Senate. 47 U.S.C. section 2000e-4(a).	Five-year term. 42 U.S.C. section 2000e-4(a).		*E.g.*, 42 U.S.C. section 2000e-5.
Farm Credit Administration	Independent agency in the Executive Branch. 12 U.S.C. section 2241.	Members of Farm Credit Administration Board appointed by President with advice and consent of Senate. 12 U.S.C. section 2242(a).	Six-year term. 12 U.S.C. section 2242(b).	*E.g.*, 12 U.S.C. sections 2243, 2252.	*E.g.*, 12 U.S.C. sections 2244, 2252, 2261, 2262, 2263, 2268.
Federal Communications Commission	(Silent)	By President with advice and consent of Senate. 47 U.S.C. section 154(a).	Seven-year term. 47 U.S.C. section 154(c).	*E.g.*, 47 U.S.C. sections 151, 201, 303, 307, 308.	*E.g.*, 15 U.S.C. section 21; 47 U.S.C. sections 151, 203.

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Federal Deposit Insurance Corp.	(Silent)	Three Directors, one of whom is the Comptroller of the Currency, who is appointed to that post by the President with advice and consent of the Senate. 12 U.S.C. section 2. Other two appointed to Board of the Corporation by the President with advice and consent of Senate. 12 U.S.C. section 1812.	Two appointive members have six-term years. 12 U.S.C. section 1812. Comptroller of Currency has five-year term, removable by President for "reasons to be communicated by him to the Senate." 12 U.S.C. section 2.	*E.g.*, 12 U.S.C. sections 1817, 1819, 1828 (a), (c) (10), (d) (2), (g) (1), (l); 1829a (e).	*E.g.*, 12 U.S.C. sections 1818, 1828 (c) (10), (h), (j); 15 U.S.C. section 57a (f).
Federal Election Commission	(Silent)	Voting members appointed by President with advice and consent of Senate. 2 U.S.C. section 437c (a).	Six-year term. 2 U.S.C. section 437c (2) (A).	*E.g.*, 2 U.S.C. sections 437d (a) (1) & (8) 438.	*E.g.*, 2 U.S.C. sections 437c (b), 437d, 437g.

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Federal Energy Regulatory Commission	Independent regulatory commission within the Dept. of Energy. 42 U.S.C. section 7171(a). Members not responsible to or subject to supervision or direction of any officer of Dept. of Energy. *Id.* section 7171(d).	By President with advice and consent of Senate. 42 U.S.C. section 7171(b).	Four-year term. Removal by President only for inefficiency, neglect of duty, or malfeasance in office. 42 U.S.C. section 7171(b).	*E.g.*, 47 U.S.C. section 7172, 7173, 7174.	
Federal Home Loan Bank Board	Independent agency in the Executive Branch. 12 U.S.C. section 1437(b).	By President with advice and consent of Senate. 5 U.S.C. App., Reorganization Plan No. 3 of 1947, section 2(a).	Four-year term. 5 U.S.C. App., Reorg. Plan No. 3 of 1947, section 2(a).	*E.g.*, 12 U.S.C. sections 1425a, 1425b(a), 1437(a); 15 U.S.C. section 57a(f).	*E.g.*, 12 U.S.C. sections 1425a(d), 1425b(b) & (c); 15 U.S.C. section 57a(f).

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Federal Labor Relations Authority	Independent establishment in the Executive Branch. 5 U.S.C. App., Reorg. Plan No. 2 of 1978, Part III, section 301(a).	By President with advice and consent of Senate. 5 U.S.C. section 7104(B).	Five-year term. 5 U.S.C. section 7104(c). Removal by President only upon notice and hearing and only for inefficiency, neglect of duty or malfeasance in office. 5 U.S.C. section 7104(b).	*E.g.*, 5 U.S.C. sections 7105, 7134.	*E.g.*, 5 U.S.C. sections 7123(b), (d).
Federal Maritime Commission	Not a part of any executive department or under the authority of the head of any executive department. 5 U.S.C. App., Reorganization Plan No. 7 of 1961, Part I, section 101(b).	By President with advice and consent of Senate. 5 U.S.C. App., Reorganization Plan No. 7 of 1961, Part I, section 102(a).	Four-year term. 5 U.S.C. App., Reorg. Plan No. 7 of 1961, Part I, section 102(c). Removal by President for inefficiency, neglect of duty, or malfeasance in office. *Id.* section 102(a).	*E.g.*, 46 U.S.C. sections 841a, 876(1)(b), 1114(b).	*E.g.*, 46 U.S.C. sections 821(b), 828, 831.

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Federal Reserve System, Board of Governors	(Silent)	By President with advice and consent of Senate. 12 U.S.C. section 241.	Fourteen-year term. 12 U.S.C. sections 241, 242. Removal by President for cause. *Id.* section 242.	*E.g.*, 12 U.S.C. sections 248(b), 263, 301, 347, 347b, 347c, 347d, 348, 348a, 349, 352, 352a, 353, 357, 358, 359, 371c, 372, 461, 615, 1844; 15 U.S.C. section 1604.	*E.g.*, 12 U.S.C. sections 504, 505; 15 U.S.C. sections 21, 57a(f).
Federal Trade Commission	(Silent)	By President with advice and consent of Senate. 15 U.S.C. section 41.	Seven-year term. Removal by President for inefficiency, neglect of duty, or malfeasance in office. 15 U.S.C. section 41.	*E.g.*, 15 U.S.C. section 57a.	*E.g.*, 15 U.S.C. sections 21, 45, 57a(f), 57b.

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Interstate Commerce Commission	Independent establishment of the United States Government. 49 U.S.C. section 10301(a).	By President with advice and consent of Senate. 49 U.S.C. section 10301(b).	Seven-year term. Removal by President for inefficiency, neglect of duty, or malfeasance in office. 49 U.S.C. section 10301(c).	*E.g.*, 49 U.S.C. sections 10321, 10701, 10704, 10710.	*E.g.*, 49 U.S.C. section 11702; 15 U.S.C. section 21.
Merit Systems Protection Board	(Silent)	By President with advice and consent of Senate. 5 U.S.C. section 1201.	Seven-year term. Removal by President only for inefficiency, neglect of duty, or malfeasance in office. 5 U.S.C. section 1202.	Board empowered to review and invalidate rules issued by the Office of Personnel Management or application of such rules by other agencies. 5 U.S.C. section 1205(e)(2).	*E.g.*, 5 U.S.C. sections 1205(a)(2), (d)(2), (e)(3)(C).

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
National Labor Relations Board	Agency of United States. 29 U.S.C. section 153(a).	By President with advice and consent of Senate. 29 U.S.C. section 153(a).	Five-year term. Removal by President, upon notice and hearing, for neglect of duty or malfeasance in office but for no other cause. 29 U.S.C. section 153(a).	*E.g.*, 29 U.S.C. section 156.	*E.g.*, 29 U.S.C. section 160.
National Mediation Board	Independent agency in the Executive Branch. 45 U.S.C. section 154.	By President with advice and consent of Senate. 45 U.S.C. section 154.	Three-year term. Removal by President for inefficiency, neglect of duty, malfeasance in office, or ineligibility, but for no other cause. 45 U.S.C. section 154.		
National Transportation Safety Board	Independent agency of the United States. 49 U.S.C. section 1902(a).	By President with advice and consent of Senate. 49 U.S.C. section 1902(b)	Five-year term. Removal by President for inefficiency, neglect of duty, or malfeasance in office. 49 U.S.C. section 1901(b).		

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
Nuclear Regulatory Commission	Independent regulatory commission. 42 U.S.C. section 5841(a).	By President with advice and consent of Senate. 42 U.S.C. section 5841(b).	Five-year term. 42 U.S.C. section 5841(c). Removal by President for inefficiency, neglect of duty, or malfeasance in office. *Id.* section 5841(e).	*E.g.*, 42 U.S.C. sections 2111, 2113, 2114, 2133, 2134, 2137, 2167, 2201, 5842, 5843, 5844.	*E.g.*, 42 U.S.C. sections 2201, 2282.
Occupational Safety and Health Review Commission	(Silent)	By President with advice and consent of Senate. 29 U.S.C. section 661(a).	Six-year term. Removal by President for inefficiency, neglect of duty, or malfeasance in office. 29 U.S.C. section 661(b).		
Postal Rate Commission	Independent establishment of the Executive Branch. 39 U.S.C. section 3601(a).	By President with advice and consent of Senate. 39 U.S.C. section 3601(a).	Six-year term. 39 U.S.C. section 3602. Removal by President for cause. *Id.* section 3601(a).	*E.g.*, 39 U.S.C. sections 3603, 3622-3624.	

Agency	*Statutory Characterization*	*Appointment*	*Tenure*	*Substantive Rulemaking*	*Enforcement Authority*
United States Postal Service	Independent establishment of the Executive Branch. 39 U.S.C. section 201.	Governors appointed by President with advice and consent of Senate. 39 U.S.C. section 202(a).	Nine-year term. 39 U.S.C. section 202(b). Removal only for cause [locus of removal power not specified]. *Id.* section 202(a).	*E.g.*, 39 U.S.C. sections 401, 3621, 3625; 18 U.S.C. section 1463.	
Railroad Retirement Board	Independent agency in the Executive Branch. 45 U.S.C. section 231f(a).	By President with advice and consent of Senate. 45 U.S.C. section 231f(a).	Five-year term. 45 U.S.C. section 231f(a).	*E.g.*, 45 U.S.C. sections 231f (b), (c).	
Securities and Exchange Commission	(Silent)	By President with advice and consent of Senate. 15 U.S.C. section 78d(a).	Five-year term. 15 U.S.C. section 78d(a).	*E.g.*, 15 U.S.C. sections 77s(a), 78w(a).	*E.g.*, 15 U.S.C. section 78u.
United States International Trade Commission	(Silent)	By President with advice and consent of Senate. 19 U.S.C. section 1330(a).	Nine-year term. 19 U.S.C. section 1330(b).		

Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF APPELLANT UNITED STATES SENATE

MICHAEL DAVIDSON,*
Senate Legal Counsel,
KEN U. BENJAMIN, Jr.,
Deputy Senate Legal Counsel,
MORGAN J. FRANKEL,
Assistant Senate Legal Counsel,
642 Hart Senate Office Building,
Washington, D.C. 20510.
(202) 224-4435

**Counsel of Record*

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REPLY BRIEF OF APPELLANT UNITED STATES SENATE

This reply addresses three issues: (1) plaintiffs' contention, rejected by the United States, that the Act unconstitutionally delegates legislative power; (2) the argument of the United States, not joined by the plaintiffs, that the Act may be administered only by an officer who serves "at the pleasure of the President"; and (3) the contention of all appellees that the fallback procedure requires the invalidation of the Act's reporting procedures. With regard to other issues, we join the replies of the Comptroller General and the House.

In an addendum to this reply we have reproduced the Third Circuit's decision in *Ameron, Inc.* v. *U.S. Army Corps of Engineers,* Nos. 85-5226 & 85-5377 (Mar. 27, 1986), issued after the filing of appellants' opening briefs. In that case, the Executive branch is challenging the constitutionality of provisions of the Competition in Contracting Act of 1984 which stay executive procurements pending the Comptroller General's disposition of timely bid protests. 31 U.S.C. 3553-3554. Even though the Comptroller General's ultimate disposition of bid protests is recommendatory only, the Executive branch is contesting the stay provisions on the ground that control over the timing of procurements is an executive function, which cannot be performed by the Comptroller General.

Because the Executive's challenge in *Ameron* presaged its arguments in this Court, *see* U.S. Br. 30-44, 51-55, the Third Circuit's convincing rejection of them is of great importance to these appeals. The court rejected the Executive's reliance both on "dicta and conclusory statements" about the Comptroller General (slip op. at 14) and on the existence of the legislative removal provision as probative of the Comptroller General's constitutional status. *Id.* at 14-18. The court held that the removal provision's lack of use over sixty-five years renders the removal question unripe, *see* Sen. Br. 25-29, and took specific issue with the conclusion of the district court in this

case that *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), supports a facial adjudication of the removal question. Slip op. at 17–18. The Third Circuit held further that, even if the removal issue were justiciable and the provision were found to be unconstitutional, the remedy would be "not to hold the 'stay' powers of the Comptroller General to be unconstitutional, but to sever as unconstitutional the provision which grants Congress the power to remove him." *Id.* at 18. Finally, the court sustained the Comptroller General's exercise of delegated executive functions because he is appointed by the President and he exercises his statutory duties independently. *Id.* at 19–25.

I. THE DISTRICT COURT CORRECTLY DECIDED THAT CONGRESS MADE THE CRITICAL LEGISLATIVE JUDGMENTS AND THAT THE ACT DELEGATES NO POLICY-MAKING POWER

As an alternative, and in their view preferred, ground for affirmance, plaintiffs claim that the Act unconstitutionally delegates legislative power by vesting in an administrative official the authority to determine whether projected deficits require application of the Act's standby administrative deficit reduction mechanism. Synar Br. 21–42; NTEU Br. 8–33. The district court soundly rejected this claim because "Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.[1] We rely principally on the district court's considered disposition of plaintiffs' claim, J.A. 38–55, and here only highlight several of the reasons for upholding this portion of its decision.

Plaintiffs allege that the "one purpose" for creating the standby administrative mechanism was "to lower the budget deficits without requiring members to vote for spe-

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[1] The United States agrees that the assignment to the Comptroller General "of the authority to make the economic calculations that determine the estimated federal deficit and the required budget cuts does not constitute an unconstitutional delegation by Congress of the 'legislative Powers' vested in it by Article I, Section 1, of the Constitution." U.S. Br. 11 n.8.

cific spending cuts or tax increases." Synar Br. 23-24; *see also* NTEU Br. 13. In their view, "this motive of avoiding political responsibility alone is enough to set aside the delegation." Synar Br. 31. However, as Justice Brandeis has observed, "No principle of our constitutional law is more firmly established than that this court may not, in passing upon the validity of a statute, enquire into the motives of Congress." *Hamilton* v. *Kentucky Distilleries Co.,* 251 U.S. 146, 161 (1919). Furthermore, plaintiffs' supposition about the "one purpose" of the majorities in each House which coalesced in support of this legislation fails to appreciate the expressed objectives of the Act's proponents. They made clear their expectation that the standby administrative mechanism would be a "disciplining agent" to promote, not to avoid, responsibility in enacting the budget, by providing the Congress and the President with certain knowledge of the consequences of any failure to develop legislation adhering to the maximum deficits established by the Act. Sen. Br. 12, 42-43.

Congress made the specific policy judgment that the health of the nation's economy requires that the federal government gradually reduce its budget deficit to achieve a balanced budget by October 1, 1990, and Congress precisely "prescribed the method of achieving that objective." *Yakus* v. *United States,* 321 U.S. 414, 423 (1944). First, Congress has established a statutory ceiling on the size of the deficit for the present and the next five years. Second, Congress has established a standby mechanism, including detailed procedures and schedules, for the execution of the deficit reduction necessary to achieve the deficit ceilings. Third, Congress has required, if sequestration is triggered, that the expenditure reductions be achieved through equal sacrifice on the defense and nondefense sides of the budget. Fourth, Congress has stipulated that, subject to its legislated exceptions, the sacrifice from any sequestration must be spread uniformly across every account and program in the budget. Viewing these elements of the Act in combination, Congress has made

the "important choices of social policy." *Industrial Union Department* v. *American Petroleum Institute,* 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment).[2]

Plaintiffs challenge only one aspect of the delegation to the Comptroller General, namely the task of projecting the annual federal budget deficit and comparing that deficit estimate to the deficit ceiling legislated in the Act.[3] Economic forecasting is neither simple nor precise, but undisputedly requires judgment about many complex issues. Nevertheless, the task remains one of the expert estimation of facts, which Congress may properly assign to an administrative agency. "It is no objection that the determination of facts and the inferences to be drawn from them in the light of the statutory standards and declaration of policy call for the exercise of judgment. . . ." *Yakus,* 321 U.S. at 425.

The Comptroller General's duty is to estimate the magnitude of the anticipated deficit based on the revenue and expenditure choices that Congress has made; he is not asked to determine the size of the deficit that he believes would be best for the economy. An agency like the Federal Reserve Board wields "substantial economic power" through its exercise of the delegated authority to conduct the nation's monetary policy.[4] In contrast to such delegations of policy-making authority, "the *only* discretion conferred [upon the Comptroller General in the Act] is in the

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[2] The district court held that "[t]hrough specification of maximum deficit amounts, establishment of a detailed administrative mechanism, and determination of the standards governing administrative decisionmaking, Congress has made the policy decisions which constitute the essence of the legislative function." J.A. 54.

[3] Plaintiffs do not challenge on grounds of excess delegation the Comptroller General's duty to allocate any required spending reduction among the government's financial accounts, presumably because they recognize that the comprehensiveness and detail of Congress' stipulations governing the distribution of spending reductions would undermine the viability of any such challenge.

[4] *Riegle* v. *Federal Open Market Committee,* 656 F.2d 873, 875 (D.C. Cir.), *cert. denied,* 454 U.S. 1082 (1981).

ascertainment of facts and the prediction of facts. The Comptroller General is not made responsible for a single *policy* judgment." J.A. 51 (emphasis in original; footnote omitted). Whatever amount of discretion the Comptroller General must exercise, for example, in order to *forecast* interest rates, a task to which plaintiffs specifically object, *see* Synar Br. 9, that discretion pales in comparison to the discretion that Congress has delegated to the Federal Reserve Board to *determine* interest rates.[5]

As the district court observed, the fact-finding task delegated to the Comptroller General in the Deficit Control Act contrasts sharply with previously sustained assignments of policy-laden duties to determine "what is a 'fair price,' *see Yakus,* 321 U.S. at 414, or when it would be 'appropriate' to freeze wages and prices, *see Amalgamated Meat Cutters & Butcher Workmen* v. *Connally,* 337 F. Supp. 737 (D.D.C. 1971) (three-judge court), or wherein lies the 'public interest,' *see National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943)."[6] The district court

[5] Congress has provided the Federal Reserve with three discretionary means to control monetary policy: setting the interest rates at which member banks borrow from it, 12 U.S.C. 248(b), imposing reserve requirements for member banks, *id.,* § 463, and engaging in open-market purchases and sales of financial obligations to control "the general credit situation of the country," *id.,* §§ 263, 353–359. *See generally Reuss* v. *Balles,* 584 F.2d 461, 462–65 (D.C. Cir.), *cert. denied,* 439 U.S. 997 (1978) (describing Federal Reserve Board's functions in conducting national monetary policy).

[6] J.A. 51. In *Yakus* the Court upheld a statutory delegation to the President of the authority to "fix[ ] prices of commodities which 'in his judgment will be generally fair and equitable and will effectuate the purposes of this Act.' " 321 U.S. at 420 (quoting Emergency Price Control Act of 1942). In *Amalgamated Meat Cutters* a three-judge district court sustained Congress' grant of authority to the President to freeze virtually all prices and wages in the economy. Unlike the price control law sustained in *Yakus,* the statute upheld in *Amalgamated* provided the President with the sole discretion to determine whether to impose a wage-price freeze, "if the President should wish to adopt that prescription, following his further reflection and taking into account future developments and experience." 337 F. Supp. at 751. In *National*

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correctly concluded that, in comparison, "the present delegation is remote from legislative abdication." J.A. 51. The delegation is constitutional because Congress has made the "fundamental policy decisions underlying [this] important legislation." *Industrial Union Department,* 448 U.S. at 687 (Rehnquist, J., concurring in judgment).[7]

II. THE CONSTITUTION DOES NOT REQUIRE THAT THE COMPTROLLER GENERAL'S DUTIES UNDER THE ACT BE PERFORMED BY AN OFFICER SERVING AT THE PRESIDENT'S PLEASURE

The Executive branch advances the argument, which the district court did not reach, that the Comptroller General's duties "are so central to the administration of the Executive Branch and the responsibilities of the President that they may be performed only by the President or by an Officer of the United States serving at the pleasure of the President." U.S. Br. 44. The adoption of this view would defeat the indispensable predicate of the Act's administrative mechanism, namely that economic projections and the application of the detailed procedures of the Act should *not* be used to implement the separate political judgments of *either* the Congress or the President but should implement only the policy that the Congress and the President together enacted into law.

A. The Independence Permitted by Humphrey's Executor is Critical to the Act's Neutral Implementation

In *Humphrey's Executor* v. *United States,* 295 U.S. 602 (1935), the Court sustained Congress' right to preclude the

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Broadcasting the Court upheld the delegation to the Federal Communications Commission of the authority broadly to regulate network radio to promote "public convenience, interest, or necessity." 319 U.S. at 214 (quoting Communications Act of 1934).

[7] The district court explained that, although the Comptroller General's delegated duty to estimate deficits "is assuredly an estimation that requires some judgment, and on which various individuals may disagree, we hardly think it is a distinctively *political* judgment, much less a political judgment of such scope that it must be made by Congress itself." J.A. 54 (emphasis in original).

President from removing commissioners of the Federal Trade Commission in the absence of "inefficiency, neglect of duty, or malfeasance in office." [8] The Court described the Federal Trade Commission as "an administrative body created by Congress to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid." 295 U.S. at 628. "We think it plain under the Constitution," the Court held, "that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named." *Id.* at 629. The Court has twice since confirmed its holding in *Humphrey's Executor. Wiener* v. *United States,* 357 U.S. 349, 352–56 (1958); *Buckley* v. *Valeo,* 424 U.S. 1, 136, 141 (1976) (per curiam).

The constitutionality of Congress' assignment of duties under the Deficit Control Act to the Comptroller General stands on an equal footing with the protections from removal conferred by Congress upon Federal Trade Commissioners and dozens of other Officers of the United States.[9] As the Third Circuit recently held, this Court's

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[8] 295 U.S. at 620 (quoting § 1 of FTC Act, 15 U.S.C. 41). The Budget and Accounting Act attempts to inhibit presidential removal for any reason. Although the Court has never addressed such a removal limitation, that issue is not currently before the Court, because the position of the United States is not that the President has the constitutional power to remove the Comptroller General for cause, but that an officer performing the Comptroller General's duties must be removable by the President without cause.

The question whether the Congress may entirely restrict the President's removal of the Comptroller General would be presented only if the President alleged that cause existed warranting his removal. If, in such a case, the Court were to sustain the President's removal of the Comptroller General and invalidate the statutory removal prohibition, the standard for presidential removal of the Comptroller General would continue to be for cause only. *See Wiener* v. *United States,* 357 U.S. 349 (1958).

[9] The list of officers who may not be removed at the will of the President includes the Governors of the Federal Reserve Board (12

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description of the Federal Trade Commission "provides a close analogy for describing the GAO and the Comptroller General: 'The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the law.' " *Ameron,* slip op. at 21–22 (quoting *Humphrey's Executor,* 295 U.S. at 624).

Because of the Comptroller General's mission to discharge his assigned duties impartially and apolitically, his selection to administer the trigger was critical to Congress' adoption of the budget reduction mechanism. Unlike the Congress and its advisors and the President and his advisors, the Comptroller General is not a participant in the intensely political debate to establish the government's priorities and adopt a budget each year. Congress' legislative goal is that, if the Act's administrative mechanism needs to be employed, then it must be implemented in accordance with strictly neutral, professional economic forecasts and accounting judgments. The Congress effectuated this objective by providing that the Act's administrator, the Comptroller General, is not to make "a single *policy* judgment." J.A. 51 (emphasis in original). Because the Act contained Congress' " 'hard political choices' . . . to impose the severe constriction of federal spending" and to determine "which program budgets will be reduced in order to achieve that result, and by how much" (J.A. 54), Congress refrained from delegating any authority to diverge from those policies incor-

U.S.C. 242) and the Postal Service Board (39 U.S.C. 202), the Members of the National Labor Relations Board (29 U.S.C. 153(a)), and the Commissioners of the Interstate Commerce Commission (49 U.S.C. 10301(c)), the Nuclear Regulatory Commission (42 U.S.C. 5841(e)), and the Consumer Product Safety Commission (15 U.S.C. 2053(a)). Under *Wiener* an implicit for-cause limitation on presidential removal presumably applies also to Commissioners of the Federal Communications Commission, the Securities and Exchange Commission, the Federal Election Commission, and the Commodity Futures Trading Commission. Appendix B to the Reply Brief for the Comptroller General compiles statutory provisions governing removal of independent officers.

porated in the Act. Key to the Act's bipartisan support was the adoption of an amendment by Senator Levin to ensure that, in implementing the budget reductions, no power be delegated to "undo the Congress' priorities" established in the budget. 131 Cong. Rec. S12944 (Oct. 9, 1985) (Sen. Levin); *see* Act, § 252(e); J.A. 134.

The Comptroller General's freedom from presidential removal at will is essential to his ability to "discharge [his Deficit Control Act] duties independently of executive control. . . . [f]or it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Humphrey's Executor,* 295 U.S. at 629. To guarantee the neutrality of the implementation of the Act, the Congress determined that the trigger mechanism could be administered only by an officer who performs no political duties and is independent of both Congress and the President "except in [his] selection, and free to exercise [his] judgment without the leave or hindrance of any other official or any department of the government." *Id.* at 625–26 (emphasis omitted).

B. The United States Misreads Humphrey's Executor

The Court's opinion in *Humphrey's Executor* does not support the Executive's cramped reading of the case, but to the contrary confirms that Congress may constitutionally restrict the removability of officers who perform a broader range of administrative tasks than the adjudication of "discrete transaction[s] or controvers[ies] affecting a particular private party." U.S. Br. 47. In *Humphrey's Executor* "[t]his Court saved [the FTC] from executive domination only by recourse to the doctrine that 'In administering the provisions of the statute in respect of "unfair methods of competition"—that is to say in filling in and administering the details embodied by that general standard—the commission acts in part quasi-legislatively and in part quasi-judicially.' " *FTC* v. *Ruberoid Co.,* 343 U.S. 470, 488 (1952) (Jackson, J., dissenting) (quoting *Humphrey's Executor,* 295 U.S. at 628). The authority to

"fill[ ] in and administer[ ] the details" that the Court was discussing was its power "to prevent persons, partnerships, and corporations . . . from using unfair methods of competition in commerce." [10] The Court explained that Congress had created the FTC as "an administrative body . . . to carry into effect legislative policies embodied in the statute in accordance with the legislative standard therein prescribed." 295 U.S. at 628. The reason that the FTC, in Justice Jackson's words, "escaped executive domination" was because "it exercises legislative discretions as to policy in completing and perfecting the legislative process." *Ruberoid Co.,* 343 U.S. at 488. Contrary to the claim of the United States, the Court did not sustain the FTC's independence from presidential removal solely because the FTC could conduct investigations for Congress or sit as a master in chancery, but importantly because Congress had delegated to the FTC the task of "filling in and administering the details" of the statute.[11]

This task of "filling in" a statute, upon which the Court predicated Congress' authority to restrict the President's removal of the Commissioners, is a quintessential example of "the performance of a significant governmental duty exercised pursuant to a public law." *Buckley v. Valeo,* 424 U.S. at 141. Nevertheless, the United States seeks to contract the actual scope of the Court's ruling in *Humphrey's Executor* by describing "the FTC's interpretation and application of the law as an incidental aspect of individual adjudicatory proceedings . . . [which] in our view . . . is more appropriately characterized for present purposes as 'quasi-judicial'." U.S. Br. 45 n.31. This conjec-

[10] 295 U.S. at 620 (quoting § 5 of the FTC Act, 15 U.S.C. 45).

[11] Although in describing the FTC's authority to "fill in" the legislative standard, the Court used the term "quasi-legislative", 295 U.S. at 628, the Court did not employ this term in the same sense in which it used it when describing the FTC's investigatory functions. Investigatory duties are termed "quasi-legislative" because Congress can perform investigatory and reporting functions. However, the duty to "fill in" a statutory standard is termed "quasi-legislative" for the entirely different reason that it substitutes for more detailed legislation.

tured limitation on *Humphrey's Executor* does not explain the Court's express recognition of the FTC's power to initiate its cases by "issu[ing] a complaint stating its charges," 295 U.S. at 620, as well as to adjudicate cases. Moreover, the Commission's application of law is not "incidental" to its activities, but the very purpose of its initiation of civil enforcement proceedings.[12] The Executive's apparent attempt constitutionally to differentiate administrative enforcement by rulemaking from enforcement by adjudication is inconsistent with the Court's recognition "that 'the choice made between proceeding by general rule or by individual, *ad hoc* litigation is one that lies primarily in the informed discretion of the administrative agency.' "[13]

Further, although the FTC may not have conducted rulemaking prior to *Humphrey's Executor, see* U.S. Br. 45 n.31, this Court has subsequently established specifically that regarding rulemaking authority, "the President may not insist that such functions be delegated to an appointee of his removable at will." *Buckley,* 424 U.S. at 141. The Executive has acknowledged in this Court that "members of the independent regulatory commissions . . . can share, much as cabinet officers share, in the power granted by Article II to execute the laws."[14] The Court should adhere to its holdings, and the previous understanding of the Executive branch, that Congress may legislate limitations on presidential dismissal of officers performing administrative duties other than solely adjudicatory functions.

[12] *See Ruberoid Co.*, 343 U.S. at 488–89 (Jackson, J., dissenting) (Congress created independent agencies such as FTC to exercise policy discretion in enforcing statutory standards).

[13] *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947)).

[14] Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae, Buckley* v. *Valeo,* at 121 n.78.

C. Humphrey's Executor Sustains the Comptroller General's Exercise of the Administrative Functions Delegated by the Act

The true issue after *Myers* v. *United States*, 272 U.S. 52 (1926), and *Humphrey's Executor* is the distinction drawn between two constitutionally distinguishable types of executive functions. In *Humphrey's Executor*, the Court recognized, on the one hand, that those agencies that can "be characterized as an arm or an eye of the executive" exercise "executive power in the constitutional sense." 295 U.S. at 628. In this category the Court placed the postmaster whose removal it had sustained in *Myers*, because "such an officer is merely one of the units in the executive department and, hence, inherently subject to the exclusive and illimitable power of removal by the Chief Executive, whose subordinate and aid he is." *Id.* at 627. Similarly, the Court pointed out, in Congress' "decision of 1789," which the Court had relied upon in *Myers*, "the office under consideration by Congress was not only purely executive, but the officer [the Secretary of Foreign Affairs, now the Secretary of State] one who was responsible to the President, and to him alone, in a very definite sense." *Id.* at 631.

The Court recognized, on the other hand, that some agencies exercise "executive *function*[*s*]—as distinguished from executive *power* in the *constitutional* sense." *Id.* at 628 (emphasis added). Agencies like the Federal Trade Commission and the Interstate Commerce Commission are in this category, because "[t]he authority of Congress . . . to require them to act in discharge of their duties *independently of executive control* cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime." *Id.* at 629 (emphasis added). Thus, the Court derived Congress' authority to limit the President's removal authority from Congress' power to require an officer to perform his duties independently of the Presi-

dent's control. Because Congress cannot require the President to relinquish control over the key political advisors and Cabinet officers who share in the exercise of the President's constitutionally conferred power, Congress similarly cannot restrict the President's ability to remove only those officers.

The Court grounded the distinction between those officers who exercise "executive power in the constitutional sense", and those other officers who perform executive duties under the direction of Congress' statutory directives, on *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803). *Humphrey's Executor,* 295 U.S. at 631. In *Marbury* the Court observed that the Constitution invests the President "with certain important political powers, in the exercise of which he is to use his own discretion. . . . To aid him in the performance of those duties, he is authorized to appoint certain officers, who act by his authority, and in conformity with his orders. In such cases, their acts are his acts. . . ." 5 U.S. at 165–66. The Court illustrated this category of executive officers with the Secretary of Foreign Affairs, who "is to conform precisely to the will of the president: he is the mere organ by whom that will is communicated." *Id.* at 166. The Court contrasted such "heads of departments [who] are the political or confidential agents of the executive, merely to execute the will of the president," *ibid.,* with an officer whose delegation of statutory duties by Congress renders him "the officer of the law," *ibid.* Subsequently, in *Kendall* v. *United States ex rel. Stokes,* 37 U.S. (12 Pet.) 524, 610 (1838), the Court confirmed the *Marbury* distinction between "political duties imposed upon many officers in the executive department, the discharge of which is under the direction of the president," and other duties delegated to executive officers by Congress, which "are subject to the control of the law, and not to the direction of the president." The holding in *Humphrey's Executor* was grounded soundly upon the Court's conclusion, in reading this line of cases,

that FTC Commissioners, like the nonpolitical officers discussed in *Marbury*, are within the group of officials who are "not removable at the will of the President." 295 U.S. at 630–31.

The Comptroller General is neither "an arm or an eye of the executive," *id.* at 628, nor the President's "subordinate and aid," *id.* at 627. To the contrary, Congress mandated that the Comptroller General perform his duties "without direction from any other officer." Budget and Accounting Act, § 304; J.A. 95. Like FTC Commissioners, the Comptroller General is "an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President." *Humphrey's Executor,* 295 U.S. at 628. The Executive's claim that the role of the Comptroller General "is by no means 'wholly disconnected from the executive department'," U.S. Br. 48 (quoting *Humphrey's Executor,* 295 U.S. at 630), is flatly inconsistent with Congress' explicit establishment of the GAO, which the Comptroller General heads, as "independent of the executive departments," Budget and Accounting Act, § 301; J.A. 93.

The Executive's objection to the Comptroller General's independent performance of his duties is based on its view that "[a] more sweeping and pervasive connection between the Comptroller General's actions and the administration of the laws that are under the President's supervision and control can scarcely be imagined." U.S. Br. 48. The question, however, is not whether the Comptroller General's actions under the Deficit Control Act have a "connection" to the President or to executive departments, but whether under the Act the Comptroller General exercises "executive power in the constitutional sense." He does not. The Comptroller General does not perform constitutionally conferred executive functions,

for example, in the conduct of foreign relations or the command of the armed forces.[15]

To the contrary, the Comptroller General does not exercise "distinctively political judgment" of any kind under the Act. J.A. 54 (emphasis omitted). The United States confuses the statutory *effect* of the Comptroller General's actions on the level of funds available for expenditure by the government, with the constitutional *nature* of the Comptroller General's actions. The Comptroller General simply does not exercise "sweeping authority . . . over the operations of the departments and agencies of the Executive Branch." U.S. Br. 51. Instead, he exercises particularized, apolitical fact-finding duties,

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[15] One variant of the Executive's argument rests on its claim that the Act permits the Comptroller General to "direct the execution of the laws by the President," U.S. Br. 48, by the Comptroller General's "issuance of binding determinations directly to the President himself [, which t]he Act requires the President to implement . . . in a sequestration order," *id.*, 49. Although the Act provides for a presidential order incorporating the Comptroller General's report, section 252(a)(1), (3), (b)(1); J.A. 124, 128, 132–33, the purpose of that step was only because, as "the Chief Executive officer of the country," the President "can enforce what he is supposed to do," 131 Cong. Rec. S12703 (Oct. 5, 1985) (Sen. Rudman).

Before the district court the United States made clear that its objection "is one limited to the personal office of the President and not everyone in the executive branch. If this statute had provided for sequestration orders to be issued by the Secretary of the Treasury, we wouldn't be making this argument." Transcript of District Court Argument, Jan. 10, 1986, at 62. This objection need not precipitate a constitutional issue, but can be resolved by the President's use of his general delegation authority to delegate this duty to a subordinate officer. 3 U.S.C. 301. When the Congress assigns a delegable duty directly to the President rather than to a subordinate officer, such as the Secretary of the Treasury, it enhances the power of the President over the organization of the government, because the President may unilaterally determine where within the Executive branch to place the responsibility to perform the duty.

to which Congress has statutorily given significant effect.[16]

For that reason, the assignment to the Comptroller General of the triggering function in the Act does not raise the threat that the United States fears that Congress may usurp the President's authority by vesting control over Executive powers in independent officers. The same law that established the Comptroller General's office created the Bureau of the Budget, the forerunner of the Office of Management and Budget, and charged it with the duty to assemble and to revise the budget requests of the Executive departments in order to prepare the federal budget on behalf of the President. Budget and Accounting Act, § 207, 42 Stat. 22. Because of the nature of those duties, the Director of the Budget Bureau, unlike the Comptroller General, was intended to function "under the immediate direction of the President." H.R. Rep. No. 14, 67th Cong., 1st Sess. 6 (1921). Recognizing that the Budget Bureau was to be "the mere agency of the President in exercising these powers," *ibid.*, the Congress respected the President's right to remove the Bureau's Director at will. Today this Court's decisions similarly establish that the Director of the Budget Bureau's successor agency, OMB, serves at the President's pleasure. Upholding the constitutionality of the Deficit Control Act would not alter the President's ability to control the

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[16] The United States argued identically before the district court that no other independent agency exercises authority "that is nearly as broad or sweeping and affects levels of spending for the Department of Defense and all executive agencies." Transcript of District Court Argument, Jan. 10, 1986, at 72. Judge Scalia responded,

> You say it affects it. Actually, the Comptroller General is given very, very little power. . . . [T]he fact that its effects may be sweeping is a consequence of congressional action; it is a consequence of the statute. Because of his prediction, the President has to cut various budgets a certain amount. But actually, what the Comptroller General has to do here is, you know, it is something for a guy with a green eye shade.

Ibid.

preparation of his budget with the assistance of his advisors, to advocate the adoption of that budget with their aid, or to administer the obligation of budgeted funds within the deficit ceiling that the joint action of the Congress and the President has made binding by law.

III. THE PROPER APPLICATION OF THE FALLBACK PROVISION MUST BE GOVERNED BY CONGRESSIONAL INTENT

In our opening brief (at 31–43) we explained that, if the Comptroller General's duties under the Deficit Control Act are incompatible with the removal provision in the Budget and Accounting Act, then the Court must determine which provision to sever. Because this severability question presents a question of legislative intent, we marshaled the historical evidence that Congress would have both established the Comptroller General's office in 1921 and delegated to him the administrative duty of triggering the deficit-reduction mechanism in 1985, irrespective of the statutory provision permitting removal of the Comptroller General by joint resolution. In response, the appellees rely almost exclusively and mechanically on the fallback provision contained in section 274(f) of the 1985 Act, J.A. 165–66, to contend that severing the legislative removal provision in the 1921 Act would be "contrary to the express desire of Congress, which specified what was to happen in the event Section 251 was held unconstitutional." U.S. Br. 56. Adhering to our understanding that both severability and the use of the fallback provision must be governed by congressional intent, we will discuss their application to the three principal claims against the constitutionality of the Act.

1. The fallback provision should be invoked if the plaintiffs are correct that the Act unconstitutionally delegates legislative power. If the Court holds that the Congress may not delegate deficit reduction powers to any administrative official, then the constitutional characteristics of the official designated in the Act would be of no consequence. Deficit reduction could be achieved only through annual legislation, such as under the fallback provision.

2. If the Court were to sustain the claim of the United States that the Comptroller General cannot perform his assigned duties because he does not serve at the President's pleasure, then adherence to the intent of Congress would require the Court to invalidate the reporting mechanism and permit the fallback mechanism to operate. The Congress sought to take the Act's administrative determinations "out of the hands of the President and the Congress." 131 Cong. Rec. H9846 (Nov. 6, 1985) (Rep. Gephardt). If the Constitution does not permit the Congress to safeguard the Act's administration from political control by delegating the Act's responsibilities to an independent officer, then we agree that the Congress would not have created the administrative mechanism. The fallback mechanism must then be used.

3. However, the fallback mechanism is not the constitutionally or statutorily required consequence of a ruling that the Comptroller General may not be removed by a joint resolution of the Congress under the 1921 Budget and Accounting Act. If the issue is ripe, *but see Ameron*, slip op. at 17–18, severance of the 1921 removal provision would not impair the intent of Congress in 1985 that the Comptroller General's functions under the Deficit Control Act be performed independently of both the Congress and the President. In our brief (at 40) we stated that there was no evidence in the legislative history of the Deficit Control Act that the Congress viewed the removal provision as relevant to the legislation; none of the appellees or amici has pointed to any such evidence. In these circumstances, the intent of Congress, which must guide any decision on severability, would be served only by severing the dormant 1921 removal provision and preserving Congress' present and critical determination that a standby procedure administered by an independent official is essential to assuring deficit reduction.

CONCLUSION

For the reasons stated in this reply and in our opening brief, the declaratory order of the district court should be reversed.

Respectfully submitted,

MICHAEL DAVIDSON,
Senate Legal Counsel,

KEN U. BENJAMIN, Jr.,
Deputy Senate Legal Counsel,

MORGAN J. FRANKEL,
Assistant Senate Legal Counsel.

April 1986.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 85-5226 & 85-5377

AMERON, INC.
and
UNITED STATES SENATE, Intervenor

Thomas P. O'Neill, Speaker of House of Representatives and Bipartisan Leadership Group,

Intervenors

Appellee

v.

U.S. ARMY CORPS OF ENGINEERS; LT. COL. MICHAEL K. COLLMEYER, CONTRACTING OFFICER, UNITED STATES OF AMERICA; AND SPINIELLO CONSTRUCTION COMPANY

United States of America,

Appellant

Appeal from the United States District Court for the District of New Jersey
(D.C. No. 85-1064)

Argued October 29, 1985
BEFORE: GARTH, and BECKER, *Circuit Judges* and HUYETT, *District Judge**

(Opinion filed March 27, 1986)

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*Honorable Daniel H. Huyett, 3rd, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

GARTH, *Circuit Judge*:

This appeal presents, in a rather prosaic setting, a problem of profound constitutional significance concerning the division of power among the three branches of our federal government. At issue is the constitutionality of the automatic stay provisions of the Competition in Contracting Act (CICA), Pub. L. No. 98-369, Subtitle D, 98 Stat. 1199-1201, codified at 31 U.S.C.A. § 3553 *et seq.* (West Supp. 1985). The United States Army Corps of Engineers and the other executive department defendants [hereinafter referred to collectively as the Army] appeal from a decision of the district court declaring the CICA stay provisions to be constitutional and ordering broad injunctive relief to plaintiff Ameron and the Congressional intervenors.

We now affirm the district court's holding that the Comptroller General, as head of the General Accounting Office, is an independent official with duties involving both the legislative and executive branches of the United States government. As such, he may constitutionally exercise the powers conferred upon him by CICA. We also conclude, however, that the injunction granted by the district court was broader than necessary to grant the full relief to which plaintiffs were entitled, and therefore modify the injunction as specified below.

I.

A.

Congress created the General Accounting Office (GAO) and the Office of the Comptroller General by the Budget and Accounting Act of 1921, Pub. L. No. 13,

§ 301, 42 Stat. 20, 23. The 1921 Act was the culmination of Congressional efforts over many years to provide accountability for the federal government's finances. The original Comptroller of the Treasury was an executive officer within the Treasury Department. 1 Stat. 65-66 (1789). The Comptroller continued as an executive officer with executive functions under subsequent enactments. *See, e.g.*, Act of March 3, 1817, 3 Stat. 366; Dockery Act of 1894, 28 Stat. 162, 205.

When they were created to replace the Comptroller of Treasury, the GAO and the Comptroller General were initially empowered to report to Congress and assist Congress in the budget process. 1921 Act, §§ 304-312, 42 Stat. 23-26. Even in 1921, however, the Comptroller General, even though created in part to assist Congress, was assigned duties that were not traditionally "legislative": auditing and settling public accounts, countersigning treasury warrants, prescribing "the forms of keeping and rendering all public accounts" -- these and other executive duties were given to the GAO and the Comptroller General by the 1921 Act, which also abolished the Comptroller of the Treasury. §§ 301, 304, 310. The parties do not dispute that the Comptroller General continues to perform significant duties that are both "legislative" and "non-legislative," i.e., executive, in nature.

As an adjunct of its account-settling role, the Comptroller General over the years began to hear protests from disappointed bidders on government contracts. *See Wheelabrator Corp. v. Chafee*, 455 F.2d 1306, 1313 (D.C. Cir. 1971). This role was formalized by the Competition in Contracting Act (CICA) in 1984. 31 U.S.C.A. §§ 3351-3356 (West Supp. 1985). CICA was enacted to remedy a major loophole in the long-standing GAO review procedure: by the time the GAO reviewed most bid protests, the protests had

become moot because either the contract had been let or the contractor was engaged in performing under the contract. While GAO regulations provided for a stay of either the granting or performance of the contract in some circumstances, *See Merriam v. Kunzig*, 476 F.2d 1233, 1236 & n.1 (3d Cir. 1973), this stay was easily overridden by the contracting agency involved. The result was that most procurements became *faits accomplis* before they could be reviewed. This situation was identified by Congress as a contributing factor to the crisis of waste in federal procurement. In particular, Congress recognized as a problem that of $168 billion in government contracts awarded in fiscal year 1983, only about one-third, $54 billion, was awarded on a competitive basis. *Competition in Contracting Act of 1984*: H.R. Rep. No. 1157, 98th Cong., 2d Sess 12 (1984). In enacting CICA, Congress attempted to provide effective review of bid challenges, and in the process to encourage competition in contracting. *See* Opinion of District Court, slip op. at 31.

In relevant part, CICA permits a potential or actual bidder who disputes the terms or awarding of a government contract to challenge the procurement or the award of the contract by filing a protest with the Comptroller General. Upon receiving the protest, the Comptroller General must "within one working day" notify the agency involved, which must then make a report on the challenged contract. 31 U.S.C. § 3353(b)(1).

The filing of a protest freezes, or stays, the awarding of the contract or any action under it until either the Comptroller General makes a decision on the protest or the agency head certifies in writing that "urgent and compelling circumstances which significantly affect interests of the United States"

require that the contract be awarded, 31 U.S.C. § 3553(c)(2), or that "the best interests of the United States" require that performance proceed under a contract already awarded by the agency. 31 U.S.C. § 3553(d)(2).

The Act requires the Comptroller General to issue a final decision on the protest within 90 working days unless he determines in writing that the circumstances of the protest require more time. 31 U.S.C. § 3554(a)(1). The Comptroller General may also exercise an "express option" to expedite review of certain cases within 45 calendar days, 31 U.S.C. § 3554(a)(2), and may dismiss patently frivolous or meritless claims on a summary basis. 31 U.S.C. § 3554(a)(3).

The power of the Comptroller General in rendering his decision is limited to a *recommendation* that the agency, *inter alia*, terminate or rebid the contract, issue a new solicitation, refrain from exercising options under a contract, or award a different contract consistent with law. 31 U.S.C. § 3554(b)(1). The only affirmative power provided to the Comptroller General is to award a prevailing protester its bid and proposal preparation costs, as well as its costs and attorneys' fees in filing and pursuing the bid protest. 31 U.S.C. § 3554(c)(1).

President Reagan signed CICA into law as part of the omnibus Deficit Reduction Act of 1984, but he declared the automatic stay provision unconstitutional upon the advice of the Attorney General and ordered the executive department not to observe it. Accordingly, the Office of Management and Budget issued instructions to executive agencies to proceed with the procurement process "as though no such [stay] provisions were contained in the act." OMB Bulletin No. 85-8 at 2 (Dec. 17, 1984).

B.

The mundane facts underlying the present controversy belie the compelling nature of the constitutional question before us. In late 1984, Ameron submitted a bid on a proposed contract to clean and repair sewer lines at West Point, New York. The Army's "Invitation for Bids" required an interested party to submit along with its bid a bond guaranteeing 20 percent of the bid amount. When the sealed bids were opened, Ameron was the apparent low bidder with an offer of $1,033,000, about $200,000 less than the next lowest bidder, defendant Spiniello Construction Company. However, Ameron's bid was rejected because the dollar amount of the bond had been altered without any indication that the surety had agreed to be bound by the change. Although Ameron contended that the change was merely the result of a typist's error,[1] the agency rejected Ameron's bid as non-responsive to the terms of the invitation and awarded the contract to Spiniello. *See* Affidavit of Michael K. Collinger at 1-2.

On March 1, 1985, within ten days of the awarding of the contract, Ameron filed a protest with the Comptroller General, claiming that the Army had wrongfully rejected its bid. Three days later, Ameron filed suit in federal district court claiming that the Army had arbitrarily rejected its bid and seeking a preliminary injunction to restrain the Army and the victorious bidder from proceeding with the contract pending the outcome of Ameron's protest to the Comptroller General. Ameron also sought a temporary restraining order enjoining performance of the contract.

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1. The original typed bond amount of $1,200,000 was "whited-out" and the bond amount of $3,000,000 was typed over the corrected portion of the bond document. App. at 8-9.

The district court first denied the request for a temporary restraining order, and then granted it on March 7, 1985 when the stay provisions of 31 U.S.C. § 3353(d)(1) were brought to its attention, pending a hearing on the preliminary injunction to be held March 18, 1985. After hearing argument on March 18 and granting the motion of the Senate, the Speaker, and the Bipartisan Leadership Group of the House to intervene as plaintiffs to support the constitutionality of CICA, the district court eventually granted the preliminary injunction on March 27, 1985. 607 F. Supp. 962 (D.N.J. 1985).

In an oral opinion delivered from the bench, the court rejected Ameron's claim that the Army had acted arbitrarily. That ruling is not before us on appeal. The court concluded, however, that Ameron was entitled to a preliminary injunction enforcing a stay because the CICA stay provision was constitutional. The court held that Congress could delegate the non-legislative power to lift the stay to the Comptroller General because he was appointed by the President in accordance with the Appointments Clause of the Constitution, Art. II § 2, Cl.2, and therefore was not merely an agent of Congress. *Id.* at 971-74. The Army filed a timely notice of appeal from the injunction ruling. A month later, on April 29, 1985, the Comptroller General issued a decision denying Ameron's protest on the merits.[2] The parties agreed that this did not render the case moot, and proceeded to file cross-motions for summary judgment.

The court thereafter denied Ameron's motion for summary judgment on the merits of its bid protest, but granted the motion of the intervenors for a permanent

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2. In essence, the Comptroller General held that it was not arbitrary for the Army to reject Ameron's bid due to the altered bond document.

injunction ordering the federal government to comply with and implement 31 U.S.C. § 3553. 610 F. Supp. 750 (D.N.J. 1985). We reproduce the full text of the court's order in the appendix.

The court also declared 31 U.S.C. § 3553 to be constitutional, and joined OMB Director David Stockman and Defense Secretary Casper Weinberger as necessary defendants. Although the injunction contains no language limiting its application to less than the entire federal government, it is apparent from the court's oral opinion that it intended its order to have controlling effect only within the District of New Jersey. *See id.* at 756. The Army appealed again, and the appeals (Nos. 85-5226, 85-5377) were consolidated for review by this court.

II.

At the outset, we must determine if this case was rendered moot by the disposition of Ameron's original bid protest by the Comptroller General. Although the Comptroller General's decision lifted the stay provided by CICA, arguably obviating the need for an injunction, it is urged that this case is not moot. Even when no more relief may be granted to a plaintiff, a case may continue to decision and remain viable on appeal if the problem presented is "capable of repetition yet evading review." *See In re Kulp Foundry*, 691 F.2d 1125, 1128-29 (3d Cir. 1982). This standard applies if 1) the problem allegedly causing injury is resolved within too short a time period to ever be fully litigated and appealed, and 2) the party seeking relief is likely to be subject to the same injury in the future. *Murphy v. Hunt*, 455 U.S. 478, 482 (1982). *See also Roe v. Wade*, 410 U.S. 113, 125 (1973).

The parties agree that this case is an appropriate one for application of the rule, and we concur. A bid protest will usually be resolved within 90 days, so that

by the time a case can be appealed to this court, it will almost always face the prospect of being regarded as moot. Moreover, Ameron, as a company frequently seeking government contracts, represented that it is likely to be faced with a similar situation again: desiring to protest a contract decision but being unable to obtain the statutorily guaranteed stay while its protest is being reviewed. Lest the issue presented evade review, we hold that the present dispute is not moot, and we proceed to consider this case on the merits.

III.

As the Supreme Court observed in *Buckley v. Valeo*, 424 U.S. 1, 124 (1976), "The principle of separation of powers was not simply an abstract generalization in the minds of the Framers: it was woven into the document that they drafted in Philadelphia in the Summer of 1787." The Constitution creates three distinct branches of government and vests specific powers in each. This design is intended to block tyranny by any one branch by providing a series of checks and balances to diffuse concentrations of power. "The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted. *INS v. Chadha*, 462 U.S. 919, 951 (1983).

Nevertheless, the Court has rejected any notion that the branches are hermetically sealed. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon the branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring). *See*

Buckley, 424 U.S. at 121. Moreover, this court has recently emphasized that separation of powers analysis must focus pragmatically on whether the challenged provision actually or potentially interferes with the ability of the affected branch to accomplish its constitutionally assigned functions. *In re The President's Commission on Organized Crime Subpoena of Nicodemo Scarfo*, No. 85-3023, slip op. at 11 (3d Cir. Feb. 14, 1986). *See also Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977).

In applying the separation of powers principle, which is not explicitly mentioned in the Constitution but which undergirds the Constitutional philosophy, the Court has more than once felt compelled to rein in one or another branch of government. The Court has held that Congress, as the legislative branch, may not delegate to itself or its agents executive or judicial power, *Hampton & Co. v. United States*, 276 U.S. 394, 406 (1928); that the executive may not exercise legislative power belonging only to Congress, *Youngstown*; and that executive and administrative duties of a non-judicial nature may not be imposed upon Article III judges. *United States v. Ferreira*, 54 U.S. (13 How.) 39, 50-51 (1852). *See generally President's Commission (Scarfo), supra*.

Moreover, the power of appointment and removal must be exercised in conformity with the separation of powers. Congress may not curtail the power of the President to remove purely executive officials, *Myers v. United States*, 272 U.S. 51 (1926), but may create agencies which exercise mixed duties whose members may be protected from removal by the executive without cause. *Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935). Congress may not, however, retain for itself the power to appoint officials of the government who exercise executive power. *Buckley*, 424 U.S. at 126.

While disputing the application of these rules to the case at hand, the parties do appear to agree on one point: the key issue in this case is the characterization of the Office of the Comptroller General. If the Comptroller General, as the Army argues, is deemed to be an agent of Congress, then his possession of executive powers and duties is arguably unconstitutional. On the other hand, if he is an executive agent, then the performance of executive duties by the Comptroller would arguably create no constitutional problem.

The only other court that has addressed the question whether the Comptroller General may constitutionally exercise the powers granted under CICA concluded, following the reasoning of the district court in the present case, that the Comptroller could constitutionally exercise mixed powers. *See Lear Siegler, Inc. v. Lehman*, No. CV 85-1125-KN, slip op. at 7-11 (C.D. Cal. Nov. 21, 1985).

In a recent decision, a three-judge panel in the United States District Court for the District of Columbia[3] held that certain provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, popularly known as the Gramm-Rudman-Hollings Act, were unconstitutional because they vested executive powers in the Comptroller General. *Synar v. United States*, No. 85-3945 (D.D.C. February 11, 1986). Under the *Synar* analysis, the Comptroller General was not permitted to exercise these powers under the Constitution. The court did not reach a firm conclusion regarding the characterization of the Comptroller General as an agent or member of a particular branch of the government, but concluded that executive power to mandate budget cuts could not

3. The three-judge court was convened pursuant to 28 U.S.C. § 2284. *See Synar v. United States*, No. 85-3945, Slip op. at 5 n.1 (D.D.C. Feb. 11, 1986).

be delegated to "an officer removable by Congress." *Id.*, slip op. at 48.

In resolving the central question of characterization as it is presented on this appeal, we confront plausible arguments on both sides. Several factors weigh in favor of considering the Comptroller General to be an executive officer. Foremost among these factors is that the Comptroller General exercises significant executive functions in managing the accounts of the federal government and is appointed by the President -- factors which, in and of themselves, arguably render the Comptroller an "Officer of the United States" under *Buckley*, 424 U.S. at 126. The historic roots of the Comptroller's functions in the Treasury Department also militate against finding that the Comptroller is merely a legislative agent.

Against these factors, the Army marshals a great welter of dicta and conclusory statements to the effect that the Comptroller General is not an executive officer but rather an agent or member of the legislative branch. Several courts, first of all, have stated without extensive analysis that the GAO is an arm of the Congress. *See, e.g., McDonnell Douglas Corp. v. United States*, 754 F.2d 365, 368 (Fed. Cir. 1985); *United States v. McDonnell Douglas Corp.*, 751 F.2d 220, 224 (8th Cir. 1984); *M. Steinthal & Co. v. Seamans*, 455 F.2d 1289, 1305 (D.C. Cir. 1964). The Army also cites to numerous points in the legislative history of the 1921 Act and in other statutes where the GAO is characterized or labelled as a "legislative" agency. *See, e.g.*, 61 Cong. Rec. 1080 (Comptroller General "is to be the arm of the Congress": Rep. Good); *id.* at 1081 (Comptroller General is "representative of Congress" unlike Director of the Bureau of the Budget "who serves the President and is the personal representative of the President": Rep. Byrns); 2 U.S.C. § 701(e) (Comptroller General listed as within the

"Legislative Branch" in the Ethics in Government Act); 59 Stat. 616 (1945) (GAO stated to be part of legislative branch in Reorganization Act of 1945).

While we recognize the authority cited by the Army, we nevertheless cannot resolve the issue before us merely on the basis of the quantity of citation. We must beware of what Justice Cardozo described as "the tyranny of labels." *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934). Indeed, in *Buckley*, the Supreme Court specifically noted that "irrespective of Congress' designation [of the Comptroller General as a "Legislative Officer"], cf. 31 U.S.C. § 65(d), the Comptroller General is appointed by the President in conformity with the Appointments Clause [and therefore may exercise executive functions]." 424 U.S. at 128 n.165.

Instead of "decision by label," we must focus on function and reality. Clearly, the GAO and the Comptroller General perform legislative and non-legislative duties. Indeed, they also perform quasi-judicial functions. In that respect, they resemble the modern regulatory agency. Therefore, the mere recital by the Army of the Comptroller General's legislative functions, which involve investigating and reporting to Congress, does not make the Comptroller General an agent of the legislature.

In characterizing the Comptroller General as an agent of the legislature, the Army also stresses the power of Congress to remove the Comptroller from office. The Army argues that Congress may constitutionally remove only its own agents, i.e., members of the legislative branch, and that Congress therefore in reserving to itself the power to remove the Comptroller General had implicitly acknowledged that the Comptroller General is an agent of the legislature. By the same token, argues the Army, Congress must have recognized that the Comptroller General could not

be an agent of the executive, because Congress may not constitutionally remove from office agents who are purely executive in character.

To support this argument, the Army relies heavily on *Myers v. United States*, 272 U.S. 52 (1928), in which the Supreme Court held that the President's power to remove *purely* executive officers could not be curtailed by Congress. However, *Myers* was severely limited by *Humphrey's Executor*, in which the Court approved Congress's attempt to insulate members of the Federal Trade Commission from removal without cause by the President.

> We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named [members of FTC, ICC and Court of Claims]. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

295 U.S. at 629.

It is not clear whether Congress's power to limit removal by the President includes the power to retain to itself removal power over "mixed-power" officers of the United States. There are two questions implicated by the Army's argument on this issue, however, which must be addressed separately: (1) whether the provision permitting Congress to remove the

Comptroller General is constitutional, and (2) whether the mere existence of this provision renders the Comptroller General an agent of Congress for the purposes of this case.

A.

The first question is not ripe for review in this case at this time. Congress has never tried to remove a Comptroller General and is unlikely to do so in the foreseeable future. The constitutionality of the removal provison, therefore, has yet to be tested, and because Congress in this case has not sought to remove the Comptroller General, we do not deem the constitutionality of the removal provision to be justiciable. *See Hastings v. Judicial Conference of the United States*, 770 F.2d 1093, 1100-01 (D.C. Cir. 1985).

By so holding, we decline to adopt the contrary conclusion reached in *Synar, supra*. In *Synar*, the court concluded that the issue of Congress' power to remove the Comptroller General was ripe for review, relying upon *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Supreme Court declared unconstitutional the delegation of Article III powers to bankruptcy judges not appointed in conformance with Article III. The district court in *Synar* held that since the Supreme Court had relied in part on the fact that bankruptcy judges could be removed for cause, the question of congressional removal power over the Comptroller General was similarly ripe for review. Slip op. at 29-30.

Northern Pipeline, however, does not control the present case. The Court struck down the statutory scheme in that case as facially violative of Article III, in that bankruptcy judges were appointed to fixed 14 year terms and could be removed for cause. Since the Court found that the judges therefore were clearly not Article

III judges under the plain language of the Constitution, the unconstitutionality of their appointment and exercise of power was immediately ripe for adjudication.

By contrast, in this case, there is no challenge to the *appointment* of the Comptroller General, which is agreed to be in conformance with the appointments clause, nor to the Comptroller General's 15 year statutory tenure. The only issue raised in this context is the constitutionality of the congressional *removal* provision, which has never been exercised in more than 60 years. Therefore, unlike *Northern Pipeline*, where the constitutionality question was ripe, here an additional act must be undertaken in order to meet the "ripeness" requirement. That act would be an attempted removal of the Comptroller General by Congress.

Moreover, even if the question were justiciable, and the provision granting Congress the power to remove the Comptroller General were found to be unconstitutional, that would only be *because* of a determination that the Comptroller General is indeed a member of the executive branch. The remedy in such a case would not be to hold the "stay" powers of the Comptroller General to be unconstitutional, but to sever as unconstitutional the provision which grants Congress the power to remove him. *See Myers*, 272 U.S. at 176.[4]

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4. The *Synar* court rejected a similar argument on the ground that it had no authority to "choose" whether to invalidate the Comptroller General's powers or Congress' removal power. In so doing, the court observed that courts faced with constitutionally incompatible statutes generally "set aside that statute which either allegedly prohibits or allegedly authorizes the injury-in-fact that confers standing upon the plaintiff." Slip op. at 32.

However, if the question of Congress' removal power is ripe in this case at all, than *a fortiori* it is also within the authority of the

B.

As to the second question -- whether the existence of Congress' power to remove the Comptroller General is determinative of the particular branch of which the Comptroller General is a member -- our answer is that the power of removal does not determine to which branch the Comptroller General belongs. Rather, if anything, it is the power of *appointment* that should control. *See Buckley v. Valeo*, 428 U.S. 1, 126 (1976). Moreover, the fact that the Comptroller General is not under executive control does not necessarily mean that he is under legislative control. Indeed, a practical analysis of how the Comptroller General and the GAO actually function reveals that the removal power vested in Congress is a power of limited importance. In more than 60 years of the GAO's existence, Congress has *never* exercised its power to remove a Comptroller General.

Viewed pragmatically, the Comptroller General functions independently of Congress in exercising his role of reviewing bid protests. There is no evidence in the record that Congress has *ever*, as a body or through individual members, exerted control over this process. With a 15-year, non-renewable term, the Comptroller General therefore appears to be one of the most independent officers in the whole of the federal government, and one whose functions are drawn from each of the branches. *See Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm.*

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court to declare that power unconstitutional, making a "choice" unavoidable. In the context of the present case, it would seem more logical to sever this never-used power rather than to strike down Congress' new statutory scheme in CICA. By contrast, in *Synar*, the court addressed a congressional scheme providing for "fallback" procedures in the event that the involvement of the Comptroller General in deficit reduction was deemed unconstitutional. *See* slip op. at 33-34.

on Legislation and National Security of the House Comm. on Government Operations, 99th Cong., 1st Sess. 35-36 (1985) testimony of Prof. Sanford Levinson [hereinafter cited as *Hearings*].

It is not surprising that, like many modern governmental units, the Comptroller General cannot neatly be labelled as totally the creature of one branch or another. This was recognized more than 20 years ago in *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94, 99 (D.D.C. 1964) *aff'd*, 339 F.2d 753 (D.C. Cir. 1964):

> The Comptroller General is the head of the General Accounting Office, 31 U.S.C. § 41. Unlike heads of most departments and establishments of the Government, he occupies a dual position and performs a two-fold function. First, he makes investigations of matters relating to the receipt, disbursement and application of public funds, and reports the results of his scrutiny tc the Congress with appropriate recommendations. In addition he pursues investigations that may be ordered by either House of Congress, or by any Committee of either House, in matters relating to revenue, appropriations or expenditures, 31 U.S.C. § 53. In performing these functions the status of the Comptroller General is that of an officer of the legislative branch of the Government. The Congress has comprehensive authority to undertake investigations in aid of legislation, or in connection with the appropriation of funds. Investigations are an aid to legislation and to the making of appropriations and are therefore auxiliary to the basic functions of Congress. The Congress may conduct investigations either through Committees or through an official such as the Comptroller General.

> The Comptroller General has also a second status as the chief accounting officer of the Government. His second principal function is that of approval or disapproval of payments made by Government departments and other agencies, as well as of settling and adjusting accounts in which the Government is concerned, 31 U.S.C. § 71. This is an executive function and in performing it the Comptroller General acts as a member of the Executive branch of the Government. The dual status of the General Accounting Office is not anomalous, for many regulatory commissions fulfill in part a legislative function and in part carry out executive duties, Humphrey's Executor v. United States, 295 U.S. 602, 55 S. Ct. 869, 79 L.Ed. 1611. Cf. Myers v. United States, 272 U.S. 52, 47 S.Ct. 21, 71 L.Ed. 160. Thus we have developed in comparatively recent years a fourth type of Government agency, -- one that combines two kinds of basic powers.

Id. at 99-100 (quoted with approval by court below, 607 F. Supp. at 970-71). We adopt the reasoning of the court in *Brookfield Construction* that the GAO is best viewed as a part of a headless "fourth branch" of government consisting of independent agencies having significant duties in both the legislative and executive branches but residing not entirely within either.

The description of the Federal Trade Commission contained in *Humphrey's Executor* provides a close analogy for describing the GAO and the Comptroller General:

> The commission is to be non-partisan; and it must, from the very nature of its duties, act with entire impartiality. It is charged with the enforcement of no policy except the policy of the

law. Its duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative. Like the Interstate Commerce Commission, its members are called upon to exercise the trained judgment of a body of experts, "appointed by law and informed by experience." [citation ommitted].

[The Commission is to be] "independent of any department of the government . . . a board or commission of dignity, permanence, and ability, independent of executive authority, except in its selection, and independent in character."

295 U.S. at 624-25 (quoting statement of Senator Newlands).

The district court correctly followed *Brookfield Construction* in holding that the GAO is a hybrid agency of the kind described in *Humphrey's Executor* and that the Comptroller General may constitutionally exercise executive functions in reviewing bid protests because he is appointed pursuant to the Appointments Clause and performs executive duties. Although a legislative officer may not be given executive duties, many executive or "fourth branch" officers perform mixed duties and therefore function in dual capacities. As the Supreme Court noted in *Springer v. Phillipine Islands*, 277 U.S. 189 (1928):

> Not having the power of appointment, unless expressly granted or incidental to its powers, the legislature cannot engraft executive duties upon a legislative office, since that would be to usurp the power of appointment by indirection; though the case might be different if the additional duties were devolved upon an appointee of the executive.

Id. at 202, quoted with approval in *Buckley*, 424 U.S. at 136-37.[5]

Our decision that both the GAO and the Comptroller General discharge their assigned functions with a measure of independence from both

5. In contrast to our holding, the *Synar* court held that the Comptroller General's significant executive powers under the Gramm-Rudman-Hollings Act placed it in a "no-man's land" controlled by neither *Myers*, which concerned purely executive officers, nor *Humphrey's Executor*, which concerned officials exercising only incidental executive functions along with primarily quasi-legislative or quasi-judicial powers. Slip op. at 44. The *Synar* court then focused almost exclusively on the question of the removal power and, finding the retention of that power by Congress to be incompatible with the Comptroller General's exercise of executive budget-cutting functions, struck down the applicable parts of the Act.

Just as we have declined to follow *Synar* with respect to the constitutionality of Congress' removal power, we also decline to follow the approach taken by the *Synar* court here. The core principle of *Humphrey's Executor* was that Congress could create agencies exercising dual functions and which were independent of unfettered executive control. In their blend of powers and functions, the Comptroller General and the GAO closely resemble the FTC and other "fourth branch" agencies. There is, therefore, little basis for distinguishing *Humphrey's Executor* in the present case. We need not reach the question whether Congress might at some point violate the separation of powers by assigning to the Comptroller General or some other official independent of executive control too great a preponderance of fundamentally executive powers or functions. This is not such a case.

We do note, however, that the result in *Synar* seems to be based, at least in part, on the court's perception that "[i]t is not as obvious today as to it seemed in the 1930s that there can be such things as genuinely 'independent' regulatory agencies." Slip op. at 40. However, as noted *infra* at note 6, the principles underlying *Humphrey's Executor* have been widely accepted for half a century. We do not read *INS v. Chadha*, 462 U.S. 919 (1983) to the contrary or as undercutting these principles.

the legislative and executive branches undermines the Army's reliance on *Buckley* and *Chadha*. In both of those cases, the legislature usurped the executive's power by subjecting agency actions to direct political control. In *Buckley*, it did so by appointing members of the Federal Election Commission. In *Chadha*, it did so by ordering the deportation of an alien by a resolution not passed by both Houses or presented to the President. Here, no political, i.e., legislative control is being asserted over any executive prerogative; an additional executive power or non-legislative function has merely been assigned to an agency which from its inception has been functionally independent of political control.[6]

6. Although the issue is not squarely presented by this case, we have not been unaware of the current public debate over the constitutionality of the entire scheme of independent agencies constituting the "fourth branch." In particular, we recognize that Attorney General Meese has questioned whether agencies exercising executive power may be kept independent of presidential authority. *See A Question of Power, A Powerful Questioner*, N.Y. Times, Nov. 6, 1985, at B8, col. 3.

We note that the constitutionality of independent agencies has been settled for half a century. *See* Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935). However, to the extent that the Attorney General finds constitutional support for his assertion that every agency must be considered a part of a particular branch of government, this argument may cut against the Army's position in this case. In a September 13, 1985 speech reported in the New York Times, the Attorney General said: "Federal agencies performing executive functions are themselves properly agents of the executive. They are not 'quasi' this or "independent' that. In the tripartite scheme of government, a body with enforcement powers is part of the executive branch of government." N.Y. Times, *supra*, at B8, col. 5-6.

Since it is undisputed that the Comptroller General and the GAO perform significant executive functions along with their legislative functions, the Attorney General's view would seem to regard them as part of the executive branch, a position contrary to the Army's argument in this case.

It must not be overlooked that through CICA, the act in question here, Congress has given the Comptroller General no ultimate veto over government appropriations. It has done no more than to furnish the Comptroller General with a tool to prevent *faits accomplis* and to encourage competition in contracting. The power of the contracting executive agency to override the stay in important circumstances provides a safety valve for any possible abuse by the Comptroller General. Most importantly, the long history of independence of the GAO supports the district court's view that the stay provision does not operate to permit intrusion by the legislative branch into executive or judicial decision making. Thus, the delicate balance of power among the branches of government has not been endangered or upset by our answer to the second question which we posed: that the mere existence of the power of Congress to remove the Comptroller General does not render the Comptroller an agent of Congress for the purpose of this case.[7]

IV.

Although we hold that the district court properly upheld the constitutionality of the Comptroller General's stay powers, the Army argues forcefully that the injunction granted was unnecessarily broad. We recognize that the Army in so arguing must overcome the considerable discretion granted to the district court in framing injunctions. *Lemon v. Kurtzman*, 411 U.S. 192, 200 (1973). The trial court must be given leeway to fashion effective remedies to correct offenses

7. Because we hold that the Comptroller General is not exclusively a legislative agent, we need not reach the questions of whether the automatic stay could survive as a "report and wait" provision and whether, if unconstitutional, the Comptroller General's stay-lifting power is severable.

to the Constitution. *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1521 (D.C. Cir. 1984) (en banc). Nevertheless, injunctive relief should be no broader than necessary to provide full relief to the aggrieved party. *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979).

The Army argues that the district court attempted to require observance of the CICA stay provisions on a "government-wide" basis, i.e., nationally. On its face, the court's order contains no limiting language to rebut this reading. However, it is apparent from the court's oral opinion that it intended to order the federal government to observe CICA only within the District of New Jersey -- the court's proper jurisdiction. *See* 610 F. Supp. at 756. Nevertheless, we agree that the injunction, even thus construed, went beyond that which was necessary to secure Ameron's rights.

There is no dispute that the Congressional intervenors were proper parties for the purpose of supporting the constitutionality of the CICA stay provision. *See Chadha*, 462 U.S. at 940.[8] To the extent, then, that the court declared CICA to be constitutional, the Congressional intervenors had standing to obtain the relief granted. However, the intervenors lack their own standing to obtain an injunction forcing compliance with the law. Nothing in the Ameron controversy gives Congress a direct "stake" in the enforcement of CICA. Once a law is passed and

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8. *Chadha* actually only held that Congress properly intervenes to defend its statute when both plaintiffs and government defendants agree that a statute is unconstitutional, i.e., when there is no one to speak for the constitutionality of the statute. Here, where Ameron argued that the statute was constitutional, arguably there is less need to recognize Congress's standing. However, the parties agree, and we concur, that Congress has standing to intervene whenever the executive declines to defend a statute or, as in this case, actually argues that it is unconstitutional.

upheld as constitutional, Congress's interest in its enforcement is no more th... that of the average citizen. *See Moore v. House of Representatives*, 733 F.2d 946, 951-52 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 779 (1985). An ordinary citizen, in turn, has no standing to obtain an injunction to enforce the law, absent a personal stake in such enforcement. *Allen v. Wright*, 104 S. Ct. 3315, 3326 (1984); *AFGE v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982). The Congressional intervenors, therefore, do not have *independent* standing to seek an injunction ordering the federal government to enforce CICA.

However, despite their lack of independent standing, the intervenors may be entitled to injunctive relief on the same grounds and to the same extent as was available to Ameron. *See Director OWCP v. Perini North River & Associates*, 459 U.S. 297, 302-305 (1982) (to the extent OWCP Director does not have separate standing, he may seek reversal of lower court decision on grounds available to nonappealing aggrieved party). The question then is: what relief was available to Ameron?

In the absence of a certified class action, Ameron was only entitled to relief for itself. *National Center for Immigrant Rights v. INS*, 743 F.2d 1365, 1371-72 (9th Cir. 1984); *Davis v. Romney*, 490 F.2d 1367, 1366 (3d Cir. 1974). While the district court's entry of a declaratory judgment of constitutionality[9] may serve as precedent for subsequent cases, an injunction directing the Army Corps of Engineers to honor the stay provision of CICA only in this case provides full relief to Ameron. *See Baeder v. Heckler*, 768 F.2d 547, 553 (3d Cir. 1985) (striking down nation-wide injunction but leaving intact holding that regulation

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9. *See* Appendix to this opinion for the district court's order of May 20, 1985.

was invalid and grant of injunctive relief in plaintiff's case).

Ameron and the Congressional intervenors make several arguments in support of the broader relief granted. First of all, they argue that the Army never made any formal objection to the proposed scope of relief. We are not impressed with this claim, since the Army made clear during its colloquy with the district court that it objected to the broader injunctive relief granted. *See* May 28 transcript at 25-29.

More importantly, Ameron and the Congressional intervenors argue that the broader injunction was justified as a response to two expressions of defiance by the executive of each of its coordinate branches: First, the executive declared a duly enacted and signed law (CICA) to be unconstitutional and second, the executive intimated that it would not follow court decisions upholding that law.

As to the first issue, the record shows that upon the President's orders, the Attorney General instructed all executive agencies to ignore the stay provisions in CICA.[10] The Justice Department sought to justify this action as within the President's duty to defend the

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10. Pursuant to the Attorney General's instruction, the Office of Management and Budget issued OMB Bulletin No. 85-8 (Dec. 17, 1984), which required, *inter alia*, that:

> Agencies shall take no action, including the issuance of regulations, based upon the invalid provisions [of CICA].
>
> With respect to the "stay" provision, agencies shall proceed with the procurement process as though no such provision were contained in the Act. Pursuant to the provisions of the Federal Acquisition Regulations, the agency may voluntarily agree to stay procurements pending the resolution of bid protests, but the grant of such a stay must be based upon other valid authority and may not be based upon the invalid stay provisions of the Act.

Constitution: "[I]n the case of a conflict between the Constitution and a statute, the President's duty faithfully to execute the law requires him not to observe a statute that is in conflict with the Constitution, the fundamental law of the land." *Hearings* at 318 (testimony of Acting Deputy Attorney General D. Lowell Jensen). *See also* Meese, *President's Right to Challenge Law*, N.Y. Times, May 21, 1985 (Letter to the Editor) Supp. App. at 180.

This claim of right for the President to *declare* statutes unconstitutional and to declare his refusal to execute them, as distinguished from his undisputed right to veto, criticize, or even refuse to defend in court, statutes which he regards as unconstitutional, is dubious at best.[11] The question of the President's

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Agencies shall comply with the provisions of 31 U.S.C. § 3553(b) concerning the submission of reports to the Comptroller General on protested procurements.

With respect to the damages provision of the Act, agencies shall not comply with declarations of awards of costs, including attorneys' fees or bid preparation costs, made by the Comptroller General.

Agencies shall comply with 32 U.S.C. § 3554(e) concerning submission of reports to the Comptroller General on unaccommodated recommendations.

11. *See* Kendall v. United States, 37 U.S. 524, 613 (1838) ("To contend that the obligation imposed on the President to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the Constitution, and entirely inadmissable.") The President's job is to execute law, not to create it. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952). Moreover, "it is, emphatically, the province and duty of the judicial department, to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). Absent a patently unconstitutional law or one infringing liberty interests or other fundamental rights of individuals, the President's asserted power and "duty" not to execute laws he finds to be unconstitutional is questionable. *See Hearings* at 39, 44 (testimony of Prof. Sanford Levinson); *id.* at 46-47 (testimony of Prof. Eugene Gressman).

actions, declarations, and purported refusal to order compliance with CICA, however, was not properly before the district court. Therefore, our task on this appeal is similarly limited to ruling only on the constitutionality of the statute before us, and on whether the remedy fashioned by the district court granted appropriate relief to the parties actually before the court. We are faced with no justiciable claim against the President stemming from an alleged usurpation of power.

The second challenged assertion of power by the executive branch is the threat of Attorney General Meese not to follow court decisions in this case. According to the Attorney General's testimony before the House's Committee on the Judiciary on April 18, 1985, the district court is not a "court of competent jurisdiction" to decide constitutional questions. Transcript of House Hearings at 24-25. Moreover, Mr. Meese declared the government's intention not to follow the district court's decision granting a preliminary injunction in Ameron until there was "an appellate decision." *Id.* at 31. Questioned further, Mr. Meese suggested that even a decision of this court -- the Court of Appeals for the Third Circuit -- might be ignored until the Supreme Court finally laid the matter to rest. *Id.* at 35-36. However, following the granting of permanent relief by the district court, the Army agreed to honor the stay provisions of CICA pending the disposition of this appeal. *See* Brief of Appellee-Intervenors Speaker and Bipartisan Leadership Group of the House of Representatives at 18-19.

In framing its relief, the district court was understandably concerned with the executive challenge to its power. The district court engaged counsel for the Army in a discussion regarding the district court's competence to rule on CICA's

constitutionality. In so doing, it elicited a concession that the court *did* have jurisdiction to rule on the question and to enforce its view through injunction in the District of New Jersey. May 28 transcript at 27. In its oral opinion, the court stressed its rejection of the executive's assertion of power to ignore an order of the district court and the suggestion of Attorney General Meese that the district court was not a court of "competent jurisdiction." 610 F. Supp. at 755-56.

It should be too obvious even to require restating that the district court, as an Article III court, has the power to rule on the constitutionality of an act of Congress and to impose appropriate remedies to compel compliance with an act found to be constitutional. That the executive in this case questioned this elementary principle did not, however, alter the specific task before the district court: to frame an injunction no broader than necessary to grant the full relief to which Ameron and the Congressional intervenors were entitled.

As Justice Douglas observed in his *Youngstown* concurrence, "[T]he emergency did not create power; it merely marked an occasion when power should be exercised." 343 U.S. at 629. Similarly, here, the felt need to reassert the constitutional scope of its power in the face of executive challenge did not create power in the district court that it did not already have, or change the judicial standards for the granting of injunctive relief. We therefore affirm the district court's obviously correct ruling that it is a court of competent jurisdiction to decide constitutional questions, even though we find the granted injunctive relief to be too broad under the circumstances of this case.

An injunction applying only to Ameron -- ordering application of the CICA stay provisions in Ameron's case -- would have provided Ameron with complete relief. While it was within the constitutional power of

the court to grant broader relief, jurisprudence governing injunctive remedies will not permit it. We therefore affirm the May 20, 1985 order of the district court,[12] except as to its final paragraph which we modify. *See Evans v. Buchanan*, 555 F.2d 373, 381 (3d Cir. 1977) (en banc). The final paragraph of the district court's order originally provided:

> FURTHER ORDERED that defendants U.S. Army Corps of Engineers, Caspar W. Weinberger and David A. Stockman are permanently enjoined from applying Federal Acquisition Circular 84-6 or OMB Bulletin No. 85-8 insofar as they conflict with 31 U.S.C. § 3553, and are permanently enjoined to secure the issuance of regulations which comply with and implement 31 U.S.C. § 3553.

We hold here that this provision granted relief broader than that to which Ameron was entitled. We therefore substitute for that provision in the district court's order the following language appropriate to the case before us:

> FURTHER ORDERED that defendants U.S. Army Corps of Engineers, Casper W. Weinberger, and David A. Stockman are permanently enjoined to comply with and implement 31 U.S.C. § 3553 in the case of Ameron, Inc.'s bid protest filed March 1, 1985.

V.

The May 20, 1985 order of the district court, as modified herein, will be affirmed in all other respects.

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12. *See* Appendix to this opinion for the full text of the original order of the district court.

APPENDIX

Text of District Court Order of May 20, 1985

This matter coming on to be considered by the court on application of Charles Tiefer on behalf of the Speaker and Bipartisan Leadership Group of the House of Representatives as plaintiffs-intervenors, and Morgan Frankel, on behalf of the Senate, plaintiff-intervenor, and it appearing from the papers submitted, the prior oral argument, the entire record in this case, and the Opinion of this Court filed on March 28, 1985, that there are no material facts in genuine dispute regarding the issue of the constitutionality of the stay provision in the Competition in Contracting Act, 31 U.S.C. § 3553, and that plaintiff and the intervenors are entitled to judgment as a matter of law, and for good cause

It is on this 20th day of May 1985:

ORDERED that in issuing its Opinion filed March 28, 1985, and in issuing this Order, this Court has been exercising the historic jurisdiction regarding the constitutionality of Acts of Congress, possessed by the Judiciary alone, of a court of competent jurisdiction;

FURTHER ORDERED that intervenors' motions for summary judgment be, and they are hereby granted; and it is

FURTHER ORDERED that 31 U.S.C. §§ 3353 be and it is hereby declared to be constitutional; and it is

FURTHER ORDERED that defendants U.S. Army Corps of Engineers, Caspar W. Weinberger and David A. Stockman are permanently enjoined from applying Federal Acquisition Circular 84-6 or OMB Bulletin No. 85-8 insofar as they conflict with 31 U.S.C. § 3553, and

are permanently enjoined to secure the issuance of regulations which comply with and implement 31 U.S.C. § 3353.

/s/ Harold A. Ackerman
HAROLD A. ACKERMAN
U.S.D.J.

Becker, *Circuit Judge*, concurring in part:

I join in Parts II and IV of the majority's opinion, and in its judgment. I disagree fundamentally with the majority's analysis in Part III however, and write separately to explain my views.

I.

Central to the majority's finding that CICA is not unconstitutional is its conviction that the Comptroller General occupies an indeterminate place in our constitutional scheme, belonging to neither the legislative, nor the executive, nor the judicial branch. Relying on *United States ex rel. Brookfield Construction Co. v. Stewart*, 234 F. Supp. 94 (D.D.C. 1964), *aff'd.*, 339 F.2d 753 (D.C.Cir. 1964), the majority states that "the Comptroller General cannot neatly be labelled as totally the creature of one branch or another," Maj. Op. at 27, and that "the GAO is best viewed as a part of a headless 'fourth branch' of government." *Id.* at 28.

Having thus severed the Comptroller General from any constitutional moorings within one of the three branches of government, the majority argues that because the GAO and the Comptroller General are "functionally independent of political control," *id.* at 31, and because the GAO has a "long history of independence," *id.* at 32, the powers granted the Comptroller General are not unconstitutional.

According to the majority: "the delicate balance of power among the branches of government has not been endangered or upset [by the provision of CICA permitting congressional removal for cause of the Comptroller General]," *id.*, and CICA is thus constitutional.

In my view, the majority's argument has gone awry on its very first step, its refusal to place the Comptroller General in one branch of government or another. The Constitution establishes three branches of government, not four. Moreover, because ours is a government of enumerated powers, there can be no branch of government not established by the Constitution. It therefore follows that there can be no fourth branch, headless or otherwise.

I admit that scholars often refer to administrative agencies as the "fourth branch" of government. *See, e.g.*, Strauss, *The Place of the Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984). The Supreme Court, however, has not acknowledged that administrative agencies, even the so-called independent regulatory agencies, belong to a category all their own. To the contrary, the Supreme Court continues to frame its separation of powers analyses in the context of the familiar triumvirate of branches. *See, e.g., INS v. Chadha*, 462 U.S. 919, 951 (1983) ("The Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive, and Judicial."); *Buckley v. Valeo*, 424 U.S. 1, 120 (1976) (in analyzing the constitutionality of the powers of the Federal Election Commission, an "independent" administrative agency, the Court referred to the "fundamental principles of the Government . . . that the powers of the three great branches of the National Government be largely separate from one another.").

The majority's insistence on a fourth branch, while perhaps intellectually fashionable, is thus contrary to the jurisprudence of the Supreme Court.[1]

I do not deny that administrative agencies are and must be part of our government, and I do not suggest that they lack legitimacy simply because they were not envisaged by the Founding Fathers. Administrative agencies developed as a response to the needs of a complex society, and so long as our society remains as complex as it is, we shall need them. My point is simply that courts engaged in constitutional analysis must work within the framework established by the Constitution, and the Constitution does not allow for any more than three branches of government. If the administrative agencies cannot fit within this framework then the framework should perhaps be changed, but if this is to be done it must be by constitutional amendment, not judicial disregard of the present Constitution. Even a living constitution cannot grow a new branch.

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1. Although in FTC v. Ruberoid Corp., 343 U.S. 470 (1952), Justice Jackson did refer to administrative agencies as "a veritable fourth branch," *id.* at 487 (Jackson, J., dissenting), that was merely descriptive; Justice Jackson was hardly setting it forth as part of a new framework for constitutional analysis. Indeed, his qualification of the description -- "a *veritable* fourth branch" -- suggests that he did not intend to be taken literally.

   The only other occasions on which any member of the Supreme Court has used "fourth branch" in an opinion when referring to administrative agencies have also been in dissents and have been similarly off-hand and descriptive, rather than analytic. *See* Process Gas Consumers Group v. Consumer Energy Council of America, 463 U.S. 1216, 1219 (1983) (White, J., dissenting); *INS v. Chadha*, *supra*, 462 U.S. at 984 (White, J., dissenting) (quoting FTC v. Ruberoid, *supra*).

In analyzing the case before us, our first task must therefore be to decide to which of the three branches of government the GAO belongs. The next step in the analysis is to classify the powers conferred on the Comptroller General by the allegedly objectionable provisions of CICA. Only then can we decide whether those powers violate the Constitution.

II.

A.

Because the office of the Comptroller General is created by statute, the Comptroller General's status within the government is a matter of statutory interpretation which, like all statutory interpretation, is controlled by legislative intent. *Paskel v. Heckler*, 768 F.2d 540, 543 (3d Cir. 1985); Murphy, *Old Maxims Never Die: The "Plain Meaning" Rule and Statutory Interpretation in the "Modern" Federal Courts*, 75 Colum. L. Rev. 1299, 1299 (1975). There is copious evidence in the legislative history that the GAO (and therefore the Comptroller General) was intended to be in the legislative branch. This evidence is summarized concisely by the majority, and there is no need to repeat it here. *See* Maj. Op. at 19-20; *see also* Maj. Op. at 19 (citing cases that arrive at the same conclusion). Because there is no evidence of legislative intent to the contrary, I believe that it is incumbent upon us to hold that the Comptroller General is within the legislative branch of government, despite the inconveniences that may attend such a holding.

The majority's reluctance to classify the Comptroller General as legislative stems from two sources: (a) the fact that certain of the Comptroller General's functions are executive in nature, *see infra* at 6-7, and (b) the fact that the Comptroller General is appointed by the President. *See* Maj. Op. at 18-19.

Although both of these facts are relevant to the question whether any of the statutes affecting the Comproller General unconstitutionally violate the principle of separation of powers, *see infra* 10-12, neither is relevant to the logically prior question: to which branch does the Comptroller General belong? As I have noted, because the office of the Comptroller General is created by statute, his status must be determined by the legislative intent.[2] In this case, the legislative intent is clear -- he belongs to the legislative branch.

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2. The Senate argues in its brief that the fact that the Comptroller General is appointed by the President precludes his being part of the legislative branch. In making this argument, the Senate relied on Buckley v. Valeo, 424 U.S. 1 (1976). *See also* Maj. Op. at 19 (citing *Buckley* for the proposition that the executive functions of the Comptroller General and his appointment by the President "arguably render the Comptroller an 'Officer of the United States,'" *i.e.*, a member of the executive branch.). This reliance is misplaced, for *Buckley* never suggested that all those appointed by the President are necessarily members of the executive branch of government. *Buckley* held that only those appointed by the President could be "Officers of the United States," but we are concerned here with the obverse problem, never contemplated by *Buckley*, whether all those so appointed are necessarily Officers of the United States.

The only reference in *Buckley* to the Comptroller General came in a footnote in which the Supreme Court rejected an analogy between the members of the Federal Election Commission (who were not appointed by the President) and the Comptroller General. The Court said that "irrespective of Congress' designation [of the Comptroller General as a legislative officer], the Comptroller General is appointed by the President in conformity with the Appointments Clause." Buckley v. Valeo, *supra*, 424 U.S. at 128 n.165. This offhand reference is not sufficient to support the Senate's point that appointment by the President with the advice and consent of the Senate automatically makes one a member of the executive branch. The *Buckley* Court intended to

B.

Having determined that the Comptroller General is a member of the legislative branch, the next step in the analysis is to determine whether CICA grants the Comptroller General any functions that are executive or judicial rather than legislative. On this point, the parties agree that the following powers granted to the Comptroller General by CICA are not legislative: the powers to (i) review protests and issue recommendations on their adequacy, 31 U.S.C.A. § 3554 (West Supp. 1985), (ii) lift the automatic stay imposed by the filing of the protest, *id.*, and (iii) demand attorneys fees and costs on a finding that the solicitation was unlawful, *id.*

I agree with the parties' conclusions. Although the meanings of "legislative," "executive," and "judicial" are somewhat indeterminate, I find it hard to believe that the powers listed above would fit under any of the more common understandings of "legislative power." In exercising these powers, the Comptroller General acts on a case-by-case basis; he applies law rather than makes it. The powers are executive, or even quasi-judicial, rather than legislative. Although in other contexts the distinction between executive and judicial would be quite important, here it is not, and I therefore pass over it. The important point, which no

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distinguish the Comptroller General from the members of the Federal Election Commission, not to establish a general rule for a situation that was not before it.

Not only is the Senate's reliance on *Buckley* weak, but there are counter-examples that disprove its thesis. There are undisputed legislative officers who are appointed by the President -- the Librarian of Congress, 2 U.S.C. § 136 (1982), the Public Printer, 44 U.S.C. § 301 (1982), and the Architect of the Capitol, 40 U.S.C. § 162 (1982). Thus, the manner of appointment cannot be dispositive.

party contests, is simply that the Comptroller General, a legislative officer, undeniably exercises non-legislative powers.

C.

The inquiry cannot end here. The three branches of government, although separate, are not airtight. *See Nixon v. Administrator of General Services*, 433 U.S. 425, 443 (1977); *United States v. Nixon*, 418 U.S. 683, 703 (1974). The Supreme Court has adopted a flexible approach, and has expressly endorsed the eloquent language of Justice Jackson in *Youngstown Sheet & Tube Co. v. Sanger*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring):

> While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.

The doctrine of separation of powers thus allows for some overlap among the branches. It could scarcely be otherwise, for virtually every branch has members who perform work that can be characterized as belonging to another branch. In the judiciary, for example, the Chief Judge, Circuit Executive, and Clerk of this Court exercise administrative responsibility that is executive rather than judicial. Every legislator has aides who do similar administrative/executive-type work. Administrative agencies that are within the executive branch often engage in both rulemaking, which is legislative in character, and adjudication, which is, of course, judicial.

The proper question in the separation of powers context, therefore, is not merely whether members of one branch do work that falls within the description of

another. Rather, the question is whether, by that work, the branch to which those members belong infringes so substantially on the other branch that the infringed-upon branch cannot carry out its constitutionally assigned functions. This test was explicitly enunciated by the Supreme Court in *Nixon v. Administrator of General Services*, *supra*, 433 U.S. at 443: "[I]n determining whether the Act disrupts the proper balance between the coordinate branches, the proper inquiry focuses on the extent to which it prevents the Executive Branch from accomplishing its constitutionally assigned functions."

Even this test is not immediately accessible, for "constitutionally assigned functions" is not a readily definable term. Each branch has many constitutionally assigned -- or, at least, constitutionally permitted -- functions. To give definition to the term, it is therefore necessary to place the problem in context, that is, to identify the objectives to be served by the principle of separation of powers and see if those objectives are threatened by the Comptroller General's CICA-derived powers.

Although scholars may debate the intricacies and wisdom of separation of powers, the original intent of the Founding Fathers in creating our system of divided powers is very clear and can be briefly stated. The principal goal of the Founding Fathers in enacting a system of separated powers was the protection of individual liberties. The colonists had experienced virtual tyranny at the hands of all three branches in their recent histories, *see* G. Wood, *The Creation of the American Republic 1776-1787* 668-70 (1969); Levi, *Some Aspects of Separation of Powers*, 76 Colum. L. Rev. 369, 373-76 (1976), and had concluded that only by diffusing power within the government could individual liberty be preserved. Echoing Montesquieu, James Madison wrote "[t]he accumulation of all

powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." Federalist No. 47 (Madison) *in The Federalist*, 373-74 (Hamilton ed. 1864); *cf.* Montesquieu, *The Spirit of the Laws*, 38 Great Books of the Western World 70 (Hutchins ed. 1952) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty."). *See also Youngstown Sheet & Tube Co. v. Sanger, supra*, 343 U.S. at 635 ("the Constitution diffuses power the better to secure liberty") (Jackson, J., concurring).[3]

We are now in a position to ask the central question in this case: do the executive-judicial powers conferred upon the Comptroller General by CICA threaten to coalesce powers in one branch such that individual liberty -- in this case, the liberty of those in Ameron's position who bid for contracts covered by the CICA -- is threatened? I think not. Three factors in particular convince me that the threat is not severe. First, CICA permits the executive branch unilaterally to override the automatic stay by submitting to the Comptroller General a written statement of "urgent and compelling circumstances which significantly affect interests of the United States." 31 U.S.C.A. § 3553(c)(2)(A). Thus, there need be no severe effects on the prerogative of the executive as a result of the

3. In *The Interdependence of Legitimacy: An Introduction to the Meaning of Separation of Powers*, 5 Seton Hall L. Rev. 435 (1974), Judge Gibbons develops the thesis that the three branches were not intended to work in isolation and that a more accurate portrayal of the system is one of dispersed but shared decisional responsibility in which at least two branches must always concur, thus providing reasonable protection against the tyrannical exercise of power by a single branch. On this theory it is not necessary to invent a fourth branch to remedy overlap in the scheme. Judge Gibbons also gives several examples, both early and recent, of how the system of separated powers protects individual liberties.

Comptroller General's powers.[4] Admittedly, § 3553(c)(2)(A) is not an executive *carte blanche*. The "urgent and compelling circumstances" must in fact exist, and I presume that this would be determined by a court of law -- the third branch. Nevertheless, the limitation on the Comptroller General's powers is real and diminishes the threat to the goals of separation of powers.

Second, Congress has no voice in the Comptroller General's day-to-day operations, and it holds no sword of Damocles over the Comptroller General's head. Congress' only power over the Comptroller General, its power of removal, is circumscribed because it requires a joint resolution of Congress, and must be for one or more of five specified reasons: permanent disability, inefficiency, neglect of duty, malfeasance, or conduct which is felonious or involves moral turpitude. 31 U.S.C. § 703(e)(1982). The joint resolution will likely be more difficult to pass than a majority vote in one house, and the five reasons, although not so narrow as to deny Congress any leeway, circumscribe Congress' power to some extent by providing a basis for judicial review of congressional removal. The result of this limitation is that, as a practical matter, Congress has not exercised, and probably will never exercise, such control over the Comptroller General that his non-legislative powers will threaten the goal of dispersion of power, and hence the goal of individual liberty, that separation of powers serves.

It is particularly instructive in this regard to compare this case with *INS v. Chadha*, *supra*, heavily relied upon by the Army. Although both cases involve

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4. At least the executive need not fear for its ability to extract itself from an exigent circumstance, e.g., a contract dispute that would threaten a vital defense contract in time of national emergency, or an environmental hazard or natural disaster.

an infringement by the legislative branch into the domain of the executive, the nature of the infringements are very different. The unicameral legislative veto struck down in *Chadha* had all the earmarks of a hastily considered, unjust bill of attainder: there was neither a published committee report nor a debate, but only a conclusory statement on the floor of the House by a single Representative. Congress made the decision to deport Chadha by an unrecorded vote. *Id.* at 926-27 (Opinion of the Court); *id.* at 963-64 (Powell, J., concurring). Here, by contrast, there is no direct congressional involvement, and consequently the danger sought to be avoided in *Chadha* -- the involvement of political passions in quasi-judicial proceedings -- is simply not present. Bidders like Ameron realistically need not fear significant and improper congressional involvement.

Finally, it must not be forgotten that the President appoints the Comptroller General. Although the power of appointment does not give the President continuing control over the Comptroller General, it does give the President the opportunity to put into that office someone who will be respectful of the prerogatives, and sympathetic to the problems, of the executive branch. Once again, this is a significant feature of the case before us that lessens the severity of the congressional infringement on executive powers and distinguishes this case from those, like *Chadha*, in which the infringement and threat to liberty is more severe.

III.

My analysis is in many ways similar to the majority's. For both of us, the independence of the Comptroller General from congressional control and the limited power of the Comptroller General over the President are central to our decision. The majority might thus contend that our differences are merely semantic, and that I toil under a "'tyranny of labels.'"

See Maj. Op. at 20 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934) (Cardozo, J.)). But the majority would be wrong. What is at stake is our adherence to the system of government established by the Constitution. It is essential that we write -- and think -- only in terms of the three branches, and that we permit no more than the terms of the Constitution, fairly interpreted, will allow.

I can only surmise that the majority was attracted to the concept of the headless fourth branch because of its fear that the Comptroller General, and all other "independent" administrative agencies, could not survive an analysis that allowed for only three branches of government. I have explained, *see supra* II.C., why I believe the concept of separation of powers is sufficiently flexible to accommodate the CICA. I assume that similar analyses would lead to the same results for most other administrative agencies, although I cannot be sure.[5] I am certain, however, that if some agency

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5. For example, it is conceivable, albeit unlikely at this late date, that someone might launch a separation of powers challenge to the adjudicatory procedures of the NLRB. Under my analysis, a court would consider the legislative history of the NLRB to determine to which branch it was intended to belong. Presumably, the answer would be that it belongs to the executive branch. Next, the court would consider whether its adjudicatory procedures were executive in nature, and would presumably conclude that they were not, but are, rather, judicial. Finally, the court would ask whether this exercise by the executive branch of judicial functions gave the executive so much power, or so intruded upon the vital functions of the judiciary, that individual liberties were threatened. In making this inquiry, the court would consider (i) how much power the President has over the NLRB's adjudicatory functions, and (ii) whether the functions are a significant intrusion upon the judiciary, or whether, on account of judicial review of NLRB decisions, the intrusion is not severe. This analysis suggests, I believe, that my approach would not eclipse the contemporary regulatory scheme.

powers cannot fit within a government of three branches, or if certain legislation permitting one branch to affect the affairs of another cannot be countenanced within the three-branch framework, then those agency powers and that legislation must fall. The judiciary cannot invent a fourth branch to house them. Otherwise, we risk the very tyranny the Founding Fathers sought so ingeniously to avoid.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NOS. 85-5226 & 85-5377

AMERON, INC.
and
UNITED STATES SENATE, Intervenor

Thomas P. O'Neill, Speaker of
House of Representatives and
Bipartisan Leadership Group,

Intervenors

Appellee

v.

U.S. ARMY CORPS OF ENGINEERS;
LT. COL. MICHAEL K. COLLMEYER,
CONTRACTING OFFICER, UNITED STATES
OF AMERICA; AND SPINIELLO
CONSTRUCTION COMPANY

United States of America,

Appellant

Appeal from the United States
District Court for the
District of New Jersey
(D.C. No. 85-1064)

Argued October 29, 1985

BEFORE: GARTH, and BECKER, *Circuit Judges*
and HUYETT, *District Judge**

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*Honorable Daniel H. Huyett, 3rd, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

ORDER AMENDING OPINION

It is ORDERED that the slip opinion in the above-captioned case, filed March 27, 1986, be amended as follows:

1. On page two, fifth line from the bottom: change "Meyer" to "Meyner";

2. On page five, line five: do not capitalize the word "see";

3. On page five, line 17: add a period after the word "Sess";

4. On page five, line 20: omit the words "slip op. at 31" and substitute "607 F. Supp. 962, 973-74 (D.N.J. 1985)";

5. On page 11, line 14 of the first full paragraph under Part III: add a quotation mark after the word "resisted."; and

6. On page 27, line 17: delete the "&".

By the Court,

/s/Leonard I. Garth

Circuit Judge

Dated: April 4, 1986

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

(A.O. U.S. Courts, G.M.C. Printing, Phila., Pa. 215-568-4264)

(25) (24) (25)

Nos. 85-1377, 85-1378, 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

REPLY BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, INTERVENORS-APPELLANTS

STEVEN R. ROSS,*
General Counsel to the Clerk,
CHARLES TIEFER,
Deputy General Counsel to the Clerk,
MICHAEL L. MURRAY,
JANINA JARUZELSKI,
Assistant Counsels to the Clerk,
U.S. House of Representatives,
The Capitol, H-105,
Washington, D.C. 20515.
(202) 225-9700

* *Counsel of Record*

APRIL 16, 1986

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MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF OF THE SPEAKER AND BIPARTISAN LEADERSHIP GROUP OF THE HOUSE OF REPRESENTATIVES, INTERVENOR-APPELLANTS

INTRODUCTION

In asking this Court to strike down the Balanced Budget and Emergency Deficit Control Act of 1985 ("Deficit Control Act" or "Act") on non-textual separation of powers grounds, the Executive Branch and the plaintiffs ("challengers") have assailed one very limited, but vital, provision of a major Act on a strained and technical basis. This statute was enacted by Congress and signed by the President to reduce the spiraling deficit and its threat to our national economy, by equal cuts, if necessary, in defense and non-defense spending. The challengers' separation of powers claim would disable the Act, even though the political Branches' authority to provide for such equally-distributed across-the-board cuts is not, and cannot be, questioned on separation of powers grounds. That technical challenge would disable the Act by striking the provision which vested the statutorily-prescribed mathematical calculations of the cuts in the independent Comptroller General ("Comptroller" or "GAO") in order to "wall" off that accounting function from political manipulation.

The constitutionality of the GAO role was not questioned even once by the Executive or by any Member of Congress during the Act's consideration, Brief of the Speaker and Bipartisan Leadership Group ("House parties" and "House Br.") at 22–24; Congress relied on court cases upholding GAO's independent status which had received "wide publicity." Brief for the United States ("Exec. Br.") at 59 n.39. Moreover, the arguments of the Executive have been persuasively refuted by the ruling in *Ameron* v. *U.S. Army Corps of Engineers*, Nos. 85–5226 and 85–5377 (3d Cir. Mar. 27, 1986) (appended to the Senate Reply Brief). As the highest court yet to review the issue, the Third Circuit unanimously sustained the

constitutionality of the GAO's performance of administrative functions, rejecting the contrary arguments of the Executive and the *Synar* district court in light of the GAO's firmly established independence.

The Executive continues to press two arguments for striking down the GAO role. The Executive contends that the role assigned in this Act "may be performed only by" an officer "serving at the pleasure of the President," i.e., that those functions are not suitable for an independent officer. Brief for the United States ("Exec. Br.") at 44; *see id.* at 44-51. Also, the Executive contends that the GAO is not independent. Exec. Br. at 30-44.[1] For neither of these arguments does the Executive proffer any express constitutional provision that the Act may be said to violate, but only a motley collection of imagined constitutional implications.

I. THE ROLE ASSIGNED BY THE DEFICIT CONTROL ACT IS SUITABLE FOR AN INDEPENDENT OFFICER

The House parties described that Act's legislative history, a description which the Executive does not dispute. The Executive's preference has been for the Office of Management and Budget ("OMB"), which carries out the President's program, to perform functions such as those required by this Act. However, Congress declined to assign the economic and mathematical calculations required by the Act, particularly the equal distribution of cuts among defense and non-defense programs, to OMB. Instead, Congress used GAO to "wall" the calculations off from politics. House Br. at 20 (quoting legislative history); *see id.* at 20-24. In so doing, Congress simply followed this Court's directives regarding the broad administrative powers that may be assigned to independent agencies. House Br. at 10-14. In *Buckley* v. *Valeo*, 424 U.S. 1 (1976), this Court restated that established law, in a unanimous

[1] The district court soundly rejected plaintiffs' argument that the Congressional Budget Office's advisory role is somehow unconstitutional. Joint Appendix ("J.A.") 55 n.18.

opinion joined by eight of the nine Justices currently serving on this Court:

> All aspects of the Act are brought within the Commission's *broad administrative powers*: rule-making, advisory opinions, and determinations of eligibility for funds. . . . These functions . . . are of kinds usually performed by independent regulatory agencies. . . . [T]he president may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). . . .

Id. at 140-41 (emphasis supplied).

Apparently recognizing the unlikelihood of a change in such a unanimous ruling, particularly in light of the strength of the underlying *Humphrey's Executor* decision, House Br. at 28-30, 35-41, the Executive declines to challenge directly the continuing vitality of *Humphrey's Executor.* Exec. Br. at 46 n.32. The Executive does little more than gratuitously publicize its changed[2] and now incorrect position regarding independent agency rulemaking.[3] While the Executive has challenged the ability of an

[2] The settled Executive position was that "members of the independent regulatory commissions are 'Officers of the United States'. . . . In consequence, they can share, much as cabinet officers share, in the power granted by Article II to execute the laws." Brief for the Attorney General as Appellee and for the United States as *Amicus Curiae, Buckley* v. *Valeo*, at 121 n.78.

[3] The Executive's new argument against independent agency rulemaking, Exec. Br. at 45 n.31, overlooks *Buckley's* language a decade ago, quoted in text, unanimously sustaining rulemaking by independent agencies. The Executive's argument that independent agencies can perform only quasi-judicial functions, Exec. Br. at 45-47, simply consists of a relabeling of what this Court has always called "quasi-legislative" as "quasi-judicial," Exec. Br. at 45 n.31, and a recycling of arguments previously rejected both outside and inside the Justice Department. *See* House Br. at 37-41 (legislative rejection); *Role of OMB in Regulation: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 97th Cong., 1st Sess. 152 (1981) (reprinting Justice Department memorandum which

Continued

independent officer to perform the functions assigned to GAO in this Act, the contradictory statements by the district court, the lack of support from the plaintiffs,[4] and the inability to dispute the teachings of *Buckley* and *Humphrey's Executor* have forced the Executive to rely on two points, both without merit.

Initially, the Executive complains that pursuant to the Act, although the figures are calculated independently, the sequestration order is issued by the President. Exec. Br. at 47-51. The Executive acknowledged in district court that "[i]f the statute had provided for sequestration orders to be issued by the Secretary of the Treasury, we wouldn't be making this argument," Transcript of *Synar* v. *United States*, Jan. 10, 1986, at 62, since final orders by independent agencies, not subject to Executive change, are well established.[5] It now appears, quite unexpectedly, that the Executive takes the provision for signature by the President as an affront to its dignity.

The district court saw no point even in discussing this issue in its opinion, let alone striking down the Act on this ground, for obvious reasons. There is no precedent forbidding or even questioning such a provision, the President never complained about it before the lawsuit, and if anything Congress legitimately anticipated that the President would eagerly make use of that famous budget-cutting pen to sign an order sought so ardently. After all, this is no case, like *United States* v. *Nixon*, 418

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had been internally rejected, which also suggested "that the Supreme Court would today retreat" from *Humphrey's Executor* and not sustain independent agency rulemaking); section 1(d) of Executive Order 12291, 46 Fed. Reg. 13193 (1981) (excluding independent agency rulemaking from OMB review) (citing 44 U.S.C. § 3052(10)(1976)).

[4] *Compare* Exec. Br. at 60 n.40 and district court opinion, J.A. 80 *with* Brief for Appellee National Treasury Employees Union ("NTEU Br.") at 40 n.37 and district court opinion, J.A. 60.

[5] *See, e.g., United States* v. *Marine Bancorporation*, 418 U.S. 602 (1974); *United States* v. *ICC*, 337 U.S. 426 (1949); *cf. Miguel* v. *McCarl*, 291 U.S. 442 (1934) (separate appearances in this Court by Solicitor General and by counsel for Comptroller General).

U.S. 683 (1974), involving application of compulsory process to a President, or a damage remedy, or any other penalty or intrusion [6] (although the courts upheld even such process, in that case). This is simply another statute providing that reports by lesser officers require the President's signature to become final orders.[7]

Second, the Executive complains that the Act assigns the Comptroller a large-scale role, one that it deems "central," "broad," "government-wide," and "sweeping and pervasive." Exec. Br. at 44, 47, and 48. Again, no precedent is offered for this complaint, and it is hard to make out the Executive's theory for striking down the Act. The Executive's analysis of the nature of the Comptroller's role is incorrect. As noted above, *Buckley* v. *Valeo* sanctioned "broad administrative powers" for independent officers appointed by the President (which include the Comptroller General). While the Comptroller's role was a necessary element of the political compromise responsible for the Act, that role is unconnected with the formation of policy. J.A. 51. The Comptroller does not decide what an appropriate deficit level would be or whether some

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[6] Another question altogether, and a major one, would be presented if the Act suggested some kind of civil or other penalty for the President, *Nixon* v. *Fitzgerald*, 457 U.S. 731, 748 n.27 (1982), and *id.* 763 n.7 (Burger, C.J., concurring), but of course it suggests nothing of the kind. Premising the challenge on the Opinions Clause, which merely states that the President can obtain opinions from his Cabinet, Exec. Br. at 49–50, is a meritless attempt to transform into a mighty engine a provision universally deemed "trifling." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 641 & n.9 (1952) (Jackson, J., concurring).

[7] *See, e.g.*, *Runkle* v. *United States*, 122 U.S. 543, 561 (1887); E.S. Corwin, *The President: Office and Powers: 1787-1957* 369–70 (4th ed. 1957). That the President has such nondiscretionary duties under the law, like any other officer, is axiomatic. *United States* v. *Lee*, 106 U.S. 196, 220–21 (1882); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 610 (1838); *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 606–13 (D.C. Cir. 1974). Congress provides for such signatures "not for the purpose of imposing a very great [signature] burden upon the President but rather as a congressional recognition of the right in him as the Chief Executive," *United States ex rel. French* v. *Weeks*, 259 U.S. 326, 333 (1922), to issue such orders.

programs should be cut by a different percentage than others. GAO merely makes projections and calculations, employing economic and mathematical formulae pursuant to statute on OMB's and CBO's advice, of uniform reductions in budget accounts and programs. As Circuit Judge Scalia aptly commented, "what the Comptroller General has to do here is, you know, it is something for a guy with a green eye shade. It isn't power. . . . It is an accountant's job." Transcript of *Synar* v. *United States*, Jan. 10, 1986, at 72.

As the House parties pointed out, without contradiction by the Executive, the scale of responsibility devolved upon the GAO by this Act is far less than that of the independent Federal Reserve Board, which the district court and the plaintiffs accept as an appropriate standard of comparison.[8] In contrast to the mere accounting and economic predictive functions assigned to the GAO here, the independent Federal Reserve Board formulates "national monetary policy," *Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 343 (1979), steering the monetary power of the United States in the global currents of debt crises, inflation, and the economic cycle. *See* House Br. at 13–14.

The Executive offers this Court no basis on which to judge the constitutionality of assignments by scale, and the matter is thoroughly inhospitable for judicial resolution. Rather, the well-established law leaves it to the democratic processes alone to decide whether the scale of a task is appropriate for a particular department or agency. Critics of those decisions are remitted to their political remedies. The Judiciary properly confines its inquiry to the nature of the functions assigned, and as fur-

[8] *See* Brief of Appellees Mike Synar, Member of Congress, *et al.*, at 23 n.8; *see also* district court opinion, J.A. 51 (comparison with Federal Reserve Board's determination of "discount rate"). Many independent agencies operate government-wide or economy-wide, such as the Merit Systems Protection Board, the Federal Trade Commission, and the Securities and Exchange Commission.

ther discussed below, the functions here are entirely appropriate for the GAO.

II. THE GAO IS AN INDEPENDENT AGENCY, CONSIDERING ITS STATUS, ITS FUNCTIONS, AND THE PROVISION FOR REMOVAL BY PUBLIC LAW

A. The Comptroller is not a "Head of Department"

The Executive's main thrust assails the GAO as not an independent agency, and thus unable to perform either its traditional or current functions. The challengers never point to an express constitutional provision which may be said to be violated by this Act, and so their attack lacks the power that drive the successful challenges in *Buckley*, *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), and *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50 (1982), namely the express provisions of the Appointments Clause, the Presentation Clause, and the "good Behavior" Clause. Rather, the Executive here seeks an expansive Judicial ruling allocating to the Executive one of those "vast open spaces in the text of that mysterious document, the Constitution of the United States," although "[t]he authors of that document implicitly delegated the power to fill those spaces to future generations of lawmakers," and asked for "self-restraint" from "the judges of the future." Stevens, *Judicial Restraint*, 22 San Diego L. Rev. 437, 451–52 (1985).

To claim those "open spaces," the Executive would constitutionalize certan nebulously-formulated principles of "energy," "respectability," and "unity" among agencies, Exec. Br. at 16. Its argument relies on a laborious demonstration of points regarding the Cabinet which, although undisputed, are irrelevant to the Comptroller. The Executive argument simply restates at length the rule regarding the "Heads of Department" and the "principal officer in each of the executive Departments" expressly singled out in Article II—that the President may remove at will, without Senate involvement, these "principal," "top-ranking," "high-ranking," "most important" officers, the

"heads of departments" or "cabinet members." Exec. Br. at 7, 24, 25 n.16, 20, 21, and 25 n.16 (quotations omitted). The Executive presents a detailed history of the Constitutional Convention's decision not to raise the Cabinet to the level of a governing Council, discusses the "Decision of 1789" and the repeal of the Tenure of Office Act which both concerned Presidential removability of Cabinet members, recapitulates the decision in *Myers* v. *United States,* 272 U.S. 52 (1926) which recited the Presidential removability of Cabinet members, and notes a number of Supreme Court cases regarding Cabinet members. Exec. Br. at 17-25.[9] However, this point has not been disputed; the House parties have freely acknowledged it. House Br. at 34.

Where that disquisition on abstract principles goes awry is that it has nothing to do with the Comptroller, in contrast to the House parties' treatment, House Br. at 25-36, which focuses precisely on that office. When the Constitution provides for "Officers of the United States," it contrasts the high-ranking "Heads of Departments," or Cabinet-level officers, with the "inferior Officers." U.S. Const., art. II, sec. 2, J.A. 92; *United States* v. *Germaine,* 99 U.S. 508, 510 (1879); *United States* v. *Mouat,* 124 U.S. 303, 307 (1888) ("the heads of the departments were defined in [*Germaine*] to be what are now called the mem-

[9] *Myers* also discusses purely executive officers such as the postmaster at issue in that case; the Comptroller is certainly not such an officer. The Executive discusses the Appointments Clause, Exec. Br. at 17-19, but this hardly contributes to its challenge to this Act. The President appointed the Comptroller General, Charles Bowsher, in 1981 in full compliance with that Clause, a strong element of the GAO's constitutionality. *See Buckley,* 424 U.S. at 128 n.165. Furthermore, the Executive eliminates its own argument, when it necessarily concedes that officers appointed by the President pursuant to that clause may or may not be subject to Presidential removal, depending on their status and functions. Exec. Br. at 45-47; *see* House Br. at 18 & n.18 (discussing Appointments Clause).

bers of the cabinet").[10] The Executive does not proffer a single citation or authority for deeming the Comptroller an officer belonging in the higher rank to which its entire argument pertains. The Comptroller has functions that are important, and sometimes even vital, but his office has never been assigned to the Cabinet, and has never warranted regular advisory attendance upon the President. This Court deems such lesser figures to be "Officers of the United States" required to be appointed pursuant to the Appointments Clause, but not the "Heads of Departments" addressed in the Executive argument. *Germaine*, 99 U.S. at 510–11.

Rather, the Comptroller is like other specially-titled officers, such as the former Commissioner of Pensions, whose status was adjudicated by this Court in *Germaine*, the Surgeon General, or the Comptroller of the Currency. When Congress created the Department of the Treasury in 1789, it established the Comptroller with an independent checking function, but his rank, like that of the Registrar and the Auditor, fell distinctly below that of the head of the Department, the Secretary of the Treasury. Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 66 (1789). When the comptroller function was vested in 1921 in the Comptroller General, the concept of the office as necessarily independent from the President was reinforced, but not by conferring the status of Cabinet rank. Rather, the overwhelming evidence shows that "it was agreed by the manager of the 1921 bill, by the President in his veto message, and by the leading contemporaneous commenta-

[10] In *Germaine*, the Court explained that "by the term 'heads of departments,' " "something different is meant from the inferior commissioners and bureau officers," *id.* at 511. The Court lined up the Cabinet, the "principal Officer in each of the executive Departments" of the Opinions Clause, and the "Heads of Departments" of the Appointments Clause, as one consistent class. *Id.* Thus, *Germaine* determined that the Commissioner of Pensions was not "the head of a department, within the meaning of the Constitution." 99 U.S. at 510. *Germaine*'s discussion of officers continues to be the law. *Buckley*, 424 U.S. at 125–26 (quoting *Germaine* extensively)

tor, that the Comptroller General could be appointed as an 'inferior officer.' " House Br. at 47 & n.55 (citing legislative history and article).[11]

In light of the Comptroller's appropriately lesser status, the Executive's expansive argument regarding asserted constitutional imperatives for Presidential control must be sharply deflated. For example, a central principle of the government for the past century has been the rule of *United States* v. *Perkins*, 116 U.S. 483 (1886), regarding inferior officers: that Congress "may limit and restrict the power of removal as it deems best for the public interest." *Id.* at 485 (quotation omitted). The Executive concedes that principle as it must, Exec. Br. at 25, since *Perkins* expressly rejected any notion that limits on Presidential removability for such officers constituted "an infringement upon the constitutional prerogative of the Executive," *Perkins*, 116 U.S. at 485.[12]

Of course, as the Executive contends, the Constitutional Convention decided not to make the President an instrument of Cabinet government in exercising his constitutional powers or to have more than one President. In the famous anecdote, President Lincoln could poll his Cabinet and announce the result as "seven noes, one aye—the ayes have it," so long as the one was Lincoln. R.F. Fenno, *The Cabinet in Perspective* 29 (1959). However, it would

[11] As President Wilson emphasized regarding the offices of Comptroller General and Deputy Comptroller General, "[i]t would have been within the constitutional power of Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department." 59 Cong. Rec. 8609 (1920) (Presidential message). The Executive disputes this, citing no authority but the district court, which itself cites none. Exec. Br. at 26 n.16; J.A. 62 n.23.

[12] *See Nixon* v. *Fitzgerald*, 457 U.S. 731, 750 (1982) (finding an unrestricted Presidential power of removal only over "the most important of his subordinates"); *id.* at 787 (White, J., dissenting) (for officers not of that high rank, "restrictions on executive authority are the rule and not the exception," and it would be a "frivoulous contention" to deem such restrictions a violation of a "constitutionally assigned Presidential function").

astound the Framers to hear that principle transformed into an enormous Executive prerogative to strike down any Acts of Congress deemed inconsistent with Presidential preferences for "responsibility" in lesser officers, Exec. Br. at 16–17.

Rather, the Constitutional Convention balanced its rejections of a plural Presidency with sharp criticism of any strong or "monarchical" prerogatives for the President.[13] The Framers' hostile reaction to the leading example before them of expansive executive prerogatives, namely, George III, has played a key role in this Court's conclusions about the limited nature of Executive powers.[14] It was James Madison, the American oracle on separation of powers, who struck the note at the Convention that harmonized the acceptance of a single President with the disdain for the hated example during colonial rule. "[E]xecutive powers . . . shd. be *confined and defined*—if large we shall have the Evils of elective Monarchies—[but] probably the best plan will be a single Executive . . . ." 1 Farrand 70 (emphasis supplied).

As Justice Frankfurter set forth, quoting Justice Holmes: "[t]he duty of the President to see that the laws be executed is a duty that does not go beyond the laws or require him to achieve more than Congress sees fit to leave within his power." *Youngstown*, 343 U.S. at 610 (concurring opinion). The Framers intended that the

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[13] *See, e.g.*, 1 M. Farrand, *The Records of the Federal Convention of 1787* 65 (1966 ed.) (Pinkney) (fearing power grants that "would render the Executive a Monarchy, of the worst kind, towit [sic] an elective one"); *id.* 66 (Randolph) (fearing "the foetus of monarchy"); *id.* (Wilson) (agreeing "that he was not governed by the British Model"); *id.* 83 (Franklin); *id.* 100 (Butler) ("Gentlemen seemed to think we had nothing to apprehend from an abuse of the Executive power. But why might not a Cataline or a Cromwell arise in this Country as well as in others"); *id.* 101 (Mason) ("We are not indeed constituting a British Government, but a more dangerous monarchy, an elective one"); *id.* 103 (Franklin) ("The Executive will be always increasing here, as elsewhere, till it ends in a monarchy"); *id.* 113 (Mason).

[14] *See Youngstown*, 343 U.S. at 640–41 (Jackson, J., concurring); *Fleming v. Page* 50 U.S. (9 How.) 603, 618 (1850).

President would carry out the laws as Congress wrote them; they did not intend that he possess sweeping inherent prerogatives, above and beyond the laws, regarding the organization of administrative duties of lesser officers in the government. That power belongs to Congress, which creates offices "by Law," U.S. Const., art. II, sec. 2, J.A. 92, employing its authority "[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by the Constitution in the Government of the United States, or in any Department or Officer thereof." U.S. Const., art. I, sec. 8, cl. 18. As described above, this Court has repeatedly and unanimously sanctioned broad administrative duties for independent agencies. Thus, only if one of the President's "confined and defined" powers plainly forbade this Act, could the Congress be barred from passing it.

B. The Comptroller's Functions are Suitable for Independence

The Executive premises a major portion of its argument on the contention that "the functions assigned to the Comptroller general under section 251 of the Act" are inherently executive. Exec. Br. at 27 (heading); *id.* at 27-30, 35 (seeking to depict functions under the Act as "matters [that] are committed . . . . to [the Chief Magistrate's] superintendance" (quotation omitted). Applying the Framers' intent to the Act's functions exposes the lack of merit in this contention. In the Deficit Control Act, Congress assigned the functions of making economic projections and mathematically calculating the formula-based cuts to the independent GAO, rather than to the President's OMB, because of the need to "wall" off those calculations from politics, particularly the calculations that equal cuts come from defense and non-defense spending. House Br. at 5, 21. *See id.* at 4-6, 20-23; J.A. 60. The Framers' pronouncements strongly support assigning to GAO these calculations, which are functionally similar to impoundment control insofar as they concern amounts

not made available for spending. *See* 2 U.S.C. §§ 686–87 (1982) (Impoundment Control Act). Such functions as impoundment control, and calculation of across-the-board cuts, conform with the historically independent, quasi-judicial and quasi-legislative comptroller function of determining whether Executive spending remains within the law. House Br. at 25–28.[15]

The independent Comptroller's function is integral to the power of the purse. In the *Federalist,* Madison had pointed to the Congress's periodic exercise of the power of the purse, including its control over how "revenue may be appropriated," as "the best possible precaution against danger from standing armies," *The Federalist No. 41* at 259. In the Virginia ratifying convention, Madison elaborated:

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[15] The Executive lays claim to the function of the "application and disbursement of the public moneys," Exec. Br. at 34 (quotation omitted). However, the Deficit Control Act, like the Impoundment Control Act, does not tamper in the least with the application and disbursement of the public moneys. Just as the Impoundment Control Act uses GAO to prevent Executive withholding of funds by Presidential fiat, prior to application and disbursement, the Deficit Control Act uses GAO calculations of across-the-board reductions in appropriation accounts and program levels prior to application and disbursement. Section 251(b)(1), J.A. 116–17.

Under both acts, the Executive apparatus of disbursement operates as before. Pre-application GAO calculation of across-the-board reductions, or of impoundments, interferes no more with disbursement than has GAO's post-applicaton account settlement. *See* General Accounting Office, *Principles of Federal Appropriatons Law* 2–21 (1982) (GAO account settlement occurs after fund application and disbursement, following certification by agency officers of voucher for payment); McGuire, *Legislative or Executive Control over Accounting for Federal Funds,* 20 Ill. L. Rev. 455, 470 (1926) ("application and disbursement of public money is an entirely different function from [the Comptroller's settlement and adjustment function which] . . . . insures to the American people through their elected representatives the same control over their executive officers as has been exercised by the Anglo-Saxon over executive officers since the days of Charles II"). Even the Executive concedes the non-executive nature of post-application settlement and adjustment of claims. Exec. Br. at 35 n.19 (conceding the Court of Claims could perform the function).

> [T]he sword and purse are not to be given to the same member. Apply it to the British government, which has been mentioned. The sword is in the hands of the British king. The purse [is] in the hands of the parliament. It is so in America, as far as any analogy can exist. . . . The purse is in the hands of the representatives of the people. They have the appropriation of all monies.[16]

Madison further articulated the Framers' view of the power of the purse in shaping the First Congress's statute creating the Treasury Department. That act treated the machinery for spending quite differently than that for the war and foreign affairs functions: it installed an elaborate system of checks against Executive abuse, with a far more limited Presidential role and a far greater Congressional one, and in particular, relied on a Comptroller's office with its traditional independence.[17] Madison delivered several historic addresses concerning the Comptroller, in which he explained the Comptroller's necessary independence from Executive will, carefully delineating the distinctions between the Comptroller's function and that of a Secretary of Foreign Affairs, who is necessarily subject to Presidential removal at will. House Br. at 28 & n.31 (discussing Madison's speeches regarding the Comptroller); *Humphrey's Executor,* 295 U.S. at 631 (noting Madison's view that "a different rule in respect of executive removal might well apply" to "the Comptroller").[18]

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[16] 3 J. Elliott, *Debates on the Adoption of the Constitution* 367 (1836); *See* 4 *id.* 175–76, 178–79 (dialogue between Mr. Locke and Mr. Maclaine regarding the purse and the sword).

[17] *See* Tiefer, *The Constitutionality of Independent Officers as Checks on Abuses of Executive Power,* 63 B.U.L. Rev. 59, 71–74 (1983) (discussing the act creating the Treasury Department, Act of Sept. 2, 1789, ch. 12, § 3, 1 Stat. 66 (1789)); House Br. at 30–31 & nn.33, 35 (Comptroller's independence).

[18] The Executive seems to suggest that the 1789 debate on the Department of Foreign Affairs represented a Congressional conclusion

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In sum, the Executive presents no persuasive argument that the functions in the Deficit Control Act must be carried out subject to the will of the Executive. The Act's cuts may be painful substantively in all sectors of the budget, but in its withholding of all-encompassing power from the Executive over calculations of the amounts not made available for disbursement, the Act accords with the Framers' intent.

C. The Provisions for Removal by Public Law

Ultimately, the Executive relies heavily on its abstract arguments concerning the provision in the 1921 act that requires a public law, based on cause, to remove the Comptroller. Exec. Br. at 30–35. As the House parties described, the provision derived from a unique historical background: the Appropriations Clause, U.S. Const., art. I, sec. 9, cl. 7, J.A. 91, and the powerful British, state, and federal history underlying it. These showed the Framers' understanding that the power of the purse implied a Comptroller independent of the Executive, with a significance well understood down to the present. House Br. at 25–36. The Executive acknowledges the force of this background, Exec. Br. at 33–35, but presents no persuasive response.[19]

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that the President's power to remove the Comptroller must necessarily override any statute regarding protection of tenure. Exec. Br. at 21–23. The view on which the Executive relies commanded "less than a third of the membership of the House," Corwin, *Tenure of Office and the Removal Power Under the Constitution,* 27 Colum. L. Rev. 362 (1927) (detailing positions and votes of House Members). Moreover, Madison himself, as "the highest source [of] even those who—a minority of a minority—put the President's power of removal on the loftiest constitutional grounds in 1789, nevertheless recognized that it might be curtailed in certain cases," namely, that of " 'the tenure by which the Comptroller is to hold his office.' " *Id.* at 366 (quoting 1 Annals of Cong. 635 (J. Gales ed. 1789)).

[19] The Executive's discussion of the Treasurer, Exec. Br. at 34, only proves the House parties' point. The proposed Treasurer discussed at the Convention was the predecessor of the Secretary of the Treasury, a

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Thus, the Executive challenge to that provision becomes a challenge to the authority of Congress to provide for a process of action by public law, in a historic context of maximum constitutional strength for that authority. The 1921 act responded to a background of Presidential use of removal threats to obtain the Comptroller's subservience, House Br. at 31–32; pursuant to that act, whether the President can effect a removal depends on the persuasiveness, in the particular circumstances, of his showing of the cause required by the 1921 Act as a basis for enacting the requisite public law. This constitutes the great protection of the Comptroller's independence, but the Executive assails it as "an even *more severe* restraint on the President," Exec. Br. at 32 (emphasis supplied), than the legislative veto-like mechanism struck down in *Myers*.

The House parties showed in detail the lack of merit in this Executive argument, House Br. at 42–49. Fundamentally, *Chadha* itself shows that the Executive's argument fails because that argument proves far too much. The provision struck down in *Myers* gave power outside the Article I enactment procedures to one chamber of Congress (the Senate) to decide, as with a legislative veto, whether to authorize an Executive action of removal. Yet, Congress may require the President to obtain authority

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Cabinet-level policymaking financial officer. He had nothing to do with the entirely separate function noted by Madison of "the independent officers of Comptroller and Auditor." 1 Annals of Cong. 393 (J. Gales ed. 1789); House Br. at 28. The Framers understood the Comptroller's function to be quite different:

> One State after another resorted to the appointment of a special officer to assist the Treasurer and to scrutinize the general fiscal administration, laying statements of the public finances before the Legislature. He was usually called the Comptroller.

A. Nevins, *The American States During and After the Revolution: 1775–89* 514 (1924); *id.* at 514–15 & nn.68, 70 (further describing Comptrollers and similar officers created in Virginia (1780), Connecticut (1786), Massachusetts (1786), North Carolina, and New Hampshire). This distinction between a Cabinet-rank arm of the Executive, and the independent Comptroller, was understood throughout the English-speaking world, both then and now. House Br. at 25–28.

by a later law in order to act, either by expressly denying such authority pending later enactment, or by granting authority with a time limit necessitating reauthorization.[20] If *Chadha* means anything, it is that the President certainly has every right to complain when a statute subjects him to one or both Houses outside the enactment process, as in *Myers*, 272 U.S. at 161; however, he cannot complain when he must obtain their authorization *through* that process, as in this provision for removal by public law.[21] The Framers thus certainly imposed a "severe restraint," but that was simply their deliberate decision in setting up elaborate checks and balances in the enactment process. *Chadha*, 462 U.S. at 946-51.[22]

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[20] *See, e.g., Chadha*, 462 U.S. at 955 n.19 (the President may be required to obtain enactment of reauthorizations in order to act, by placing "durational limits on authorizations"); *Youngstown*, 343 U.S. at 638 (Jackson, J., concurring);

[21] The sole exception is if the President's inherent authority to remove the Comptroller were shown to be so overwhelming, so "conclusive and preclusive," *Youngstown*, 343 U.S. at 638 (concurring opinion), that a requirement of authorization by public law for such removal is unconstitutional. In light of the powerful constitutional history showing that the Framers deeply understood protection from removal for an independent Comptroller to be implicit in the power of the purse of U.S. Const., art. I, sec. 9, cl. 7, House Br. at 25-28, the Executive cannot make such a showing, and for this officer devoid of the attributes of Cabinet rank, it has certainly not made that showing.

[22] The Executive also discusses the House's power of impeachment, and the Senate's power of trial following impeachment, as though these were no different from the removal provision in the 1921 act, Exec. Br. at 31-2. However, *Chadha* discussed the powers of impeachment and conviction as examples when each House "act[s] alone and outside of its bicameral legislative role . . . These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution." 462 U.S. at 955-56. Here, similarly, the House parties would "underscore the difference" between action by one or both Houses alone, as in impeachment and in the provision struck down in *Myers*, and the entirely different authority of Congress and the President when they enact a public law with "presentment and bicameralism," *Chadha*, 462 U.S. at 956, as would occur pursuant to the provision in the 1921 act for removal by joint resolution.

Lastly, the Executive proffers the spectre of Congressional "influence," asserting that the removal provision "can only be understood as the reservation of a right to exercise substantive control" over the Comptroller. Exec. Br. at 32. The Third Circuit's *Ameron* opinion (reprinted as an appendix to the Senate Reply Brief) addresses persuasively why the argument is without merit. Just as this Court has deemed the GAO an "independent agency," *Bowsher* v. *Merck & Co., Inc.*, 460 U.S. 824, 844 (1983), the Third Circuit has found the Comptroller to be "one of the most independent officers in the whole of the federal government," *Ameron,* slip op. at 19. "[A] practical analysis of how the Comptroller General and the GAO actually function reveals that the removal power" is "a power of limited importance." "In more than 60 years of the GAO's existence," that power has "*never*" been exercised. *Id.*

As a rhetorical device, the challengers attribute the removal power under that provision to Congress "alone," as though one or both Houses could remove the Comptroller. However, as the *Ameron* concurring opinion added, the provision is "no sword of Damocles over the Comptroller General's head," for it requires both a showing of cause and "a joint resolution," *id.* at 43, i.e., a public law. Such a law must be presented to the President. *See* Corwin, *supra* note 18, 27 Colum. L. Rev. at 396–97 (describing significance of presentation of that joint resolution).

The Third Circuit scorned any comparison between the mechanisms in *Buckley* and *Chadha* for Congressional control by legislative appointments and vetoes, and this GAO provision which works only through enactment of a public law:

> It is particularly instructive in this regard to compare this case with *INS* v. *Chadha, supra,* heavily relied upon by the [Executive] . . . . [for] the nature of the infringements are very different. The unicameral legislative veto struck down in *Chadha* had all the earmarks of a hastily considered, unjust bill of attainder . . . . Here, by

> contrast, there is no direct congressional involvement, and consequently the danger sought to be avoided in *Chadha* . . . is simply not present.

Ameron, slip op. at 43–44 (concurring opinion).

A host of commentators, including many relied upon by the Executive, agree on the GAO's constitutionality.[23] No more conscientious opinion has been advanced then the opinion of the very counsel who presented *Myers* for the Executive, Solicitor General Beck:

> My further study and reflection . . . have convinced me that my first position in this matter was unsound and that it is necessary, to prevent irresponsible spending of public funds, that the Comptroller General be responsible only to Congress.[24]

As he elaborated:

> Congress has the power over the public purse. It is its greatest power, and in the history of the English-speaking race, it has been a most potent one, not merely in safeguarding the Commonwealth but the liberties of the citizen. . . . [T]he Comptroller General . . . must be independent of the Executive.

Id. The value of that counsel has hardly diminished. On the contrary, today more than ever, the GAO serves as the nation's vital check on Executive abuse in matters such as impoundment control and procurement. To

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[23] The following commentators, cited in Exec. Br. at 41 n.28 & 43 n.30, examine and sustain GAO's constitutionality: F. Mosher, *The GAO: The Quest for Accountability in American Government* 242 (1979) ("independent agency"); R. Sperry, D. Desmond, K. McGraw & B. Schmitt, *GAO 1966-1981: An Administrative History* 257 (1981) (confirming the GAO's "delicate constitutional balance"); Donovan & Irvine, *The President's Power to Remove Members of Administrative Agencies,* 21 Cornell L.Q. 215, 240–41 (1936).

[24] J.M. Beck, *Our Wonderland of Bureaucracy* 190 (1932).

render it either impotent or subject to the Executive would be perilous.[25]

CONCLUSION

No constitutional provision supports a facial challenge to this Act. The challengers have failed to meet the standards required for this Court to wield the weapon most disruptive to democracy—the power to strike down Acts of Congress. This Court should allow the political Branches to work their will with the intractable problems of budgeting. The Act should be upheld.

Respectfully submitted,

STEVEN R. ROSS,
General Counsel to the Clerk,

CHARLES TIEFER,
Deputy General Counsel to the Clerk,

MICHAEL L. MURRAY,
JANINA JARUZELSKI,
Assistant Counsels to the Clerk,

U.S. House of Representatives,
The Capitol, H-105,
Washington, D.C. 20515.
(202) 225-9700

Counsel for the Speaker and
Bipartisan Leadership Group.

APRIL 16, 1986.

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[25] Of course, no sound ruling could be so sweeping as to call the impoundment control and procurement acts into question. The district court, J.A. 71-72 n.29, and the Executive, Exec. Br. at 41 n.29, both noted some of the distinctions. More substantially, the Deficit Control Act did not respond to a particular Executive abuse, but rather to the intractable deficit problem. In contrast, the impoundment control and procurement acts responded to major historic problems necessitating an outside check on the Branch subject to those problems, for which GAO's role, as the outside tool for the power of the purse, was peculiarly necessary.

(26) (25) (26)

Nos. 85-1377, 85-1378 and 85-1379

In the Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL.

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE UNITED STATES

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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EDITOR'S NOTE

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REPLY BRIEF FOR THE UNITED STATES

The Solicitor General, on behalf of the United States, respectfully files this reply brief to respond to an argument made by the other appellees with which we do not agree. Specifically, we respond herein to the argument by appellees Synar, et al. (Synar) and National Treasury Employees Union, et al. (NTEU) that Section 251 of the

Balanced Budget and Emergency Deficit Control Act is unconstitutional because the assignment to an administrative officer of the responsibility for determining the amount of the spending reductions required by the Act is an impermissible delegation by Congress of the "legislative Powers" vested in it by Article I, Section 1 of the Constitution. In our view, the district court correctly rejected that contention (J.A. 38-55).

We argue in our principal brief that under the doctrine of separation of powers, the Comptroller General cannot perform the administrative functions assigned to him by Section 251 (i) because he is subject to removal by Congress and is an officer of the Legislative Branch, and (ii) because those functions are so central to the responsibilities of the President that they must be performed by an Officer of the United States who serves at the pleasure of the President. If the Court agrees with that submission, it need not consider the broader argument advanced by Synar and NTEU that the Act results in an unconstitutional delegation of legislative power *irrespective* of the identity of the official to whom the responsibility for executing the Act is assigned.[1] Because of our view that the

[1] The district court acknowledged that it was unnecessary to reach the unconstitutional delegation issue in light of its holding that Section 251 is unconstitutional because of the role of the Comptroller General in executing the deficit reduction provisions. The district court nevertheless elected to afford this Court the benefit of its views on the delegation question because of the requirement in Section 274(c) that judicial resolution of the validity of the Act be expedited to the greatest extent possible and the provision in Section 274(b) for a direct appeal to this Court. J.A. 38-39.

However, there is no occasion for this Court also to address the delegation issue if it holds Section 251 unconstitutional because of the role of the Comptroller General. In that event, the fallback procedures prescribed by Section 274(f) of the Act will automatically be invoked. Section 274(f) contemplates that the report of the Directors of OMB and CBO that was submitted to the Comptroller General

role contemplated for the Comptroller General renders Section 251 unconstitutional in its present form, we shall proceed here by assuming that this defect would be eliminated by vesting in an Office properly constituted to receive them the responsibilities that Section 251 now vests in the Comptroller General.

A

The principle that Congress may not "delegate" its legislative powers to the Executive Branch is one aspect of the separation of powers under the Constitution. It derives from the demarcation mandated by the Constitution between the "legislative Powers" vested in Congress by Article I, Section 1 and the "executive Power" vested in the President by Article II, Section 1. The legislative authority is the power to "make all Laws" (Art. I, § 8, Cl. 18), which are then carried into effect by officers of the Executive Branch. Invocation of the nondelegation principle in a particular instance rests on a determination that Congress has authorized the Executive not simply to carry a law into effect, but actually to "make" the law as well. This aspect of the separation of powers is quite different from others the Court confronts.

Many of this Court's cases that have considered the separation of powers under the Constitution have involved aggrandizement or encroachment by one Branch at the ex-

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will be submitted to a joint committee of Congress and be enacted as a joint resolution, which in turn will trigger a sequestration order by the President in the same manner as the report issued by the Comptroller General pursuant to Section 251(b). See U.S. Br. 5, 57-58. Because the sequestration order and spending reductions under the fallback mechanism would result from action by Congress itself, the fallback mechanism raises no question of an unconstitutional delegation of legislative power.

pense of another. See, *e.g.*, *INS* v. *Chadha*, 462 U.S. 919, 946-951 (1983); *Northern Pipeline Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 57-60, 87 (1982) (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 120-141 (1976); *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952). Other of the Court's cases have involved claims that one Branch has impermissibly interfered with the performance or integrity of another within the area of its assigned responsibilities. See, *e.g.*, *Nixon* v. *Administrator of General Services*, 433 U.S. 425, 439-455 (1977); *United States* v. *Nixon*, 418 U.S. 683, 705-713 (1974); *United States* v. *Sioux Nation*, 448 U.S. 371, 390-407 (1980); *id.* at 424-434 (Rehnquist, J., dissenting). In those circumstances, the Court is frequently called upon to enforce the "self-executing safeguard[s]" (*Buckley*, 424 U.S. at 122) embodied in the Constitution to guard against excesses by the respective Branches.[2]

The non-delegation doctrine addresses the opposite situation: not a claim that Congress has arrogated to itself power that properly belongs to another Branch, but rather a claim that Congress has abdicated its own "legislative Powers" to the Executive. The Constitution does not contain self-executing safeguards to protect against the latter potential, because the structure of the Constitution rests on the premise that the "opposite and rival interests"[3] represented in the separate Branches will be actively asserted in order to jealously guard each Branch's own

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[2] The submission in our opening brief that Section 251 is unconstitutional because it assigns executive functions to an officer who is removable by Congress, not the President, concerns such an encroachment by Congress on the Executive; it also concerns the application of the particular constitutional safeguards—the Appointments Clause (Art. II, § 2, Cl. 2) and the corresponding power of removal—that serve to protect the integrity and autonomy of the Executive Branch against such encroachment.

[3] *The Federalist No. 51*, at 322 (J. Madison) (C. Rossiter ed. 1961).

prerogatives. *Buckley*, 424 U.S. at 122-123. Because of the constitutional presumption that the Members of the Legislative Branch act in the interest of that Branch and as representatives of the people, and because Congress may at any time rescind unduly broad statutory authority vested in the Executive simply by passing a new law, this Court has properly been reluctant to conclude that Congress has impermissibly yielded its own power to the Executive. Nevertheless, the Court has identified certain fundamental attributes of the legislative power that must be exercised by Congress itself and that may not be "delegated" to the Executive Branch. *Field* v. *Clark*, 143 U.S. 649, 692, 694 (1892).

"The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society" (*The Federalist No. 75,* at 450) (A. Hamilton) (C. Rossiter ed. 1961). Congress may either prescribe such rules with great precision or, instead, "commit something to the discretion of the other departments." *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825). The Legislature must be afforded broad lattitude in deciding upon the discretion to be left to the Executive Branch, especially in light of Congress's express power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its enumerated powers (Art. I, § 8, Cl. 18). By virtue of the Necessary and Proper Clause, the degree to which administrative discretion is appropriate for carrying a substantive legislative policy "into Execution" is itself a matter of legislative policy for Congress to resolve. The Court accordingly has held that "[i]n determining what [Congress] may do in seeking assistance from [the Executive] branch, the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *J.W. Hampton, Jr., & Co.* v. *United States*, 276 U.S. 394, 406 (1928).

Under this constitutional framework, the "essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct." *Yakus* v. *United States*, 321 U.S. 414, 424 (1944). "These essentials are preserved when Congress has specified the basic conditions of fact upon whose existence or occurrence, ascertained from relevant data by a designated administrative agency, it directs that its statutory command shall be effective." *Id.* at 424. "If Congress shall lay down by legislative act an intelligible principle to which the [administrative body] is directed to conform, such legislative action is not a forbidden delegation of legislative power." *J.W. Hampton*, 276 U.S. at 409. Accord *Connolly* v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986), slip op. 10 n.7.

As we now show, in the Balanced Budget and Emergency Deficit Reduction Act, Congress has unambiguously announced the basic legislative policy of reducing the federal deficit and has articulated "intelligible principle[s]" for the administrative implementation of that policy. The Act therefore does not result in an unconstitutional delegation by Congress of its legislative powers.

B

1. Contrary to the contention of appellees Synar (Br. 22-23) and NTEU (Br. 14-21), Congress plainly performed the "essentials of the legislative function" (*Yakus*, 321 U.S. at 424) when it passed the 1985 Act. It enacted into law a requirement that the budget deficit be reduced to $0 by 1991; and to achieve that end, Congress specified a "maximum deficit amount" for each of the next five fiscal years. § 201(a)(1) (J.A. 104).[4] Thus, Congress has made

[4] Adding a new paragraph (7) to Section 3 of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 622.

the critical "determination of the legislative policy" (*Yakus*, 321 U.S. at 424) and "has itself established the standards of legal obligation" (*A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 530 (1935)).

Congress further prescribed the manner in which the necessary deficit reductions will be achieved for each fiscal year in the absence of any intervening law passed by Congress to achieve those reductions in some other manner. The Act first establishes an administrative mechanism for determining whether the projected budget deficit for a particular fiscal year will exceed the statutorily prescribed "maximum deficit amount" by more than $10 billion (or $0 in fiscal years 1986 and 1991). § 251(a)(1)(B) and (b)(1) (J.A. 109, 117).[5]

If the projected deficit exceeds the applicable statutory maximum by more than the amount allowed, the reductions in budgetary resources then must be distributed according to detailed standards in the Act. One-half of the reductions must be made under accounts for defense programs and the other half under accounts for non-defense programs. § 251(a)(3)(B) (J.A. 110-111). Up to 50% of these overall reductions are to be achieved, according to a prescribed formula, by cancelling certain non-exempt "automatic spending increases"[6] that are scheduled to take effect during the fiscal year. § 251(a)(3)(C) (J.A. 111). Increases in benefits under Title II of the Social Security Act, the Railroad Retirement Act, and certain other programs are specifically exempted from the reduction requirements. § 255 (J.A. 143-148). In addition, special rules are provided to limit the amount of reduc-

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[5] The method of making that determination is discussed in Point C, at pages 14-16, *infra*.

[6] The term "automatic spending increase" is defined in Section 257(1)(A) (J.A. 159-160). Those increases are typically tied to the Consumer Price Index or a comparable index. See § 256(a)(1) (J.A. 148-149).

tions that may be taken from such programs as guaranteed student loans, Medicare, child support enforcement, federal pay, unemployment compensation, commodity credit, and migrant and Indian health (§ 256 (J.A. 148-159)). In these various provisions, Congress has furnished considerable guidance for implementing its basic legislative determination that the budget deficit shall not exceed the statutorily specified maximum for each of the next five fiscal years.

2. Despite the statutory provisions just discussed, appellees Synar and NTEU contend (Synar Br. 22-23; NTEU Br. 14-21) that Congress, by adopting an automatic deficit reduction procedure, has declined to make the difficult political choices involved in reducing the federal deficit. As the district court concluded, this charge is simply "not true" (J.A. 54):

> To the contrary, [Congress] has decided to impose the severe constriction of federal spending necessary to produce a balanced budget by fiscal year 1991, it has established an intricate administrative mechanism to address that goal, and it has specified in meticulous detail which program budgets will be reduced in order to achieve that result, and by how much.[7]

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[7] For the reasons stated in the text, this case is quite different from *American Textile Manufacturers Institute, Inc.* v. *Donovan*, 452 U.S. 490 (1981), in which two dissenting Justices believed that the Act in question resulted in an unconstitutional delegation by Congress of its legislative powers. *Id.* at 543-548 (Rehnquist, J., dissenting). In that case, Congress provided for the Secretary of Labor to establish health standards that would assure certain protections "to the extent feasible." The dissenting Justices were of the view that Congress had not been able to make the difficult policy choices and had left the whole matter, not merely the triggering factual determinations, in the hands of the Secretary. Here, by contrast, Congress has made the "hard policy choices" (*id.* at 543, quoting *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 671 (1980)

Moreover, the formula in the Act in fact reflects significant policy judgments by Congress, such as the allocation of reductions equally to defense and non-defense programs, the exemption of Social Security and Railroad Retirement benefits, similar exemptions for low-income and other programs, special treatment for specific programs, and the requirement that reductions come first from automatic spending increases. These provisions are the product of precisely the sort of debate, judgment, and compromise of the interests of competing factions that the Framers intended to be accomplished in the legislative process. See *The Federalist No. 70*, at 426-427 (A. Hamilton); *Chadha*, 462 U.S. at 948-951.

The validity of the approach Congress adopted is not undermined by the fact that, subject to specified exceptions and priorities, the spending reductions required by the Act will be uniformly applied. § 251(a)(3)(E)(iv)(I) (J.A. 113). The choice of the uniformity itself reflects the exercise of a legislative judgment by Congress that the burdens of the budget reduction process should be borne proportionately by the various government agencies and the public at large.

Against this background, the argument by appellees Synar and NTEU that Congress has failed to make difficult policy choices cannot be premised on the view that Congress has impermissibly "delegated" those policy choices to administrative officers by affording them complete freedom to select which government programs will bear the burden of deficit reductions and to what extent. See page 13, *infra*. As we have shown, the Act itself prescribes the manner in which the reductions must be allocated. Appellees Synar and NTEU's objection there-

(Rehnquist, J., concurring in judgment)) by prescribing overall deficit maximums and allocating the necessary reductions in expenditures among various programs.

fore must instead be to Congress's own determination to prescribe *by law* an automatic reduction in the deficit over the next five years, rather than to leave the matter entirely to the enactment of separate and more tailored laws in this and future years. See NTEU Br. 14-21. Indeed, appellee Synar even goes so far as to contend that the Act was passed for the "improper" purpose of enabling Congress to "evade its lawmaking responsibilities"—which he describes as "mak[ing] specific decisions to cut specific programs or enact specific tax increases" (Synar Br. 23, 25, 28, 30).

Contrary to this contention, however, nothing in the Constitution requires Congress to make "specific," program-by-program judgments on these questions, and there was nothing "improper" about Congress's decision not to do so in this instance. Whether to approach the problem in general legislation of several years' duration, or instead to enact a series of more limited laws, is committed entirely to Congress's discretion as a matter of legislative policy. Resolution of that question by *Congress* obviously presents no issue of "delegation" of legislative power to the Executive. Moreover, Congress has preserved the prerogative, as it must, to enact appropriations and other laws that achieve the 1985 Act's deficit reduction targets in some other manner or supersede on a permanent basis the 1985's Act's system of deficit reductions.

3. Appellee Snyar also contends that the Act results in an unconstitutional delegation of legislative power because it involves what he labels a "core function of Congress"—"the power of the purse" (Br. 32-33). In making this argument, he relies in particular on the constitutional limitation that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law" (Art. I, § 9, Cl. 7). See also NTEU Br. 10. However, that Clause was intended merely to negate the existence of an *inherent* right in the Executive to draw money from the

Treasury in the absence of a law passed by Congress. See *Cincinnati Soap Co.* v. *United States*, 301 U.S. 308, 321 (1937). The Clause does not impose any unique limitation on the authority of Congress to pass a law that vests the Executive with broad discretion in the expenditure of appropriated funds,[8] just as it does not grant Congress any unique right to appoint or control the Officers of the United States who are responsible for executing such an appropriations law. See U.S. Br. 34-35. Rather, the reference to "Appropriations made by *Law*" establishes that Congress's lawmaking prerogatives and the separation-of-powers limitations on those prerogatives are the same with respect to the "power of the purse" as they are with respect to Congress's other legislative powers.

Nor does appellee Synar cite any authority for the application of a unique non-delegation principle because of the assertedly "core" nature of the subject matter involved. To the contrary, in *Lichter* v. *United States,* 334 U.S. 742, 778-779 (1948), the Court observed that "[a] constitutional power implies a power of delegation of authority under it sufficient to effect its purposes." Consistent with this view, in *J.W. Hampton,* the Court sustained against a charge of impermissible delegation a statutory provision that authorized the President to increase or decrease import duties in certain circumstances. Although it was argued that the taxing power was distinguishable from other power under which Congress had conferred broad

[8] In fact, appropriations statutes often have afforded broad discretion to the Executive. See, *e.g.*, Act of Mar. 26, 1790, ch. 4, § 3, 1 Stat. 105 ("the President is authorized to draw from the treasury a sum not exceeding ten thousand dollars, for the purpose of defraying the contingent charges of government"). By contrast, where the Framers intended to impose limitations on Congress's power to confer broad authority on the Executive with respect to the expenditure of appropriated funds, they did so expressly in the Constitution. See Art. I, § 8, Cl. 12 ("but no Appropriation of Money to that Use [to raise and support Armies] shall be for a longer Term than two years").

authority and discretion on the Executive, the Court perceived "no such distinction" (276 U.S. at 409). It explained: "The same principle that permits Congress to exercise its rate making power in interstate commerce, by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, justifies a similar provision for the fixing of customs duties on imported merchandise" (*ibid.*).[9] That same principle also enables Congress to vest the Executive with broad discretion in the implementation of legislative policies regarding the expenditure of appropriated funds.

C

Finally, appellees Synar and NTEU contend (Synar Br. 34-38; NTEU Br. 21-28) that the Act results in an unconstitutional delegation of legislative power because it vests unduly broad discretion in the officers responsible for executing the deficit reduction requirement, without adequate legislative standards to guide their decisions. We do not quarrel with the proposition that the determinations made by the Comptroller General pursuant to Section 251 of the Act have a fundamental and pervasive impact throughout the Executive Branch and that judgment, prediction, and discretion are required in the execution of the Act. Indeed, it is for these reasons that we argue in our principal brief that the functions involved cannot be performed by an officer who is subject to removal by Congress and does not serve at the pleasure of the President.

[9] See also *Chadha*, 462 U.S. at 953-954 n.16, and *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542-544 (1950) (immigration); *United States* v. *Sharpnack*, 355 U.S. 286 (1958) and *United States* v. *Grimaud*, 220 U.S. 506 (1911) (determination of what constitutes a federal crime); *District of Columbia* v. *John R. Thompson Co.*, 346 U.S. 100 (1953) (legislation for the District of Columbia).

But the further notion that the Act is so completely devoid of standards to guide the administrative undertaking that the functions involved cannot be assigned to *any* officer of the Executive Branch is without merit.

We noted in this regard that appellees Synar and NTEU do not argue in this Court, as they did not below (J.A. 47 n.11), that the administrative function of allocating the overall deficit excess among various programs and accounts amounts to the performance of an unconstitutionally delegated legislative power.[10] They instead focus their allegations of standardless "delegation" on the threshold determination of the overall budget deficit. But in that respect as well, Congress has set forth "intelligible principle[s]" to be followed by those executing the Act. *J.W. Hampton*, 276 U.S. at 409.

1. It is settled that Congress may "specif[y] the basic conditions of fact upon whose existence or occurrence * * * its statutory command shall be effective," and it may provide for those facts to be "ascertained from relevant data by a designated administrative agency" (*Yakus*, 321 U.S. at 424-425). See, *e.g.*, *Field* v. *Clark*, *supra; The Cargo of the Brig Aurora* v. *United States*, 11 U.S. (7 Cranch) 382, 388 (1813). The constitutionality of such a law "depends not upon the breadth of the definition of the facts or conditions which the administrative officer is to

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[10] Questions of statutory interpretation and judgment of the sort typically associated with the execution of a law of course will arise in the administrative process of allocating reductions (J.A. 72-73). For example, in his report issued pursuant to Section 251, the Comptroller General disagreed with the OMB/CBO report's exclusion from the sequesterable base of approximately $6.3 billion of unobligated balances for defense programs, and he also disagreed with the position of the Director of OMB that the payment of interest on federally guaranteed bonds issued by the Washington Metropolitan Area Transit Authority was subject to sequestering. See GAO, *Report to the President and Congress: Budget Reductions for FY 1986, Balanced Budget and Emergency Deficit Control Act of 1985*, at 6, 33 (1986).

find[,] but upon the determination whether the definition sufficiently marks the field within which the Administrator is to act so that it may be known whether he has kept within it in compliance with the legislative will" (*id.* at 425). See also *Opp Cotton Mills, Inc. v. Administrator of the Wage and Hour Division,* 312 U.S. 126, 144-146 (1941). Accordingly, no objection will lie in this case under the delegation doctrine simply because the officials responsible for implementing the Act must make determinations concerning the budget deficit for the federal government as a whole and, in doing so, must make projections concerning the state of the Nation's economy.

Moreover, the Act "specif[ies] the basic conditions of fact" on which reductions in outlays are to be based and "sufficiently marks the field within which the Administrator is to act." The Act first establishes a "maximum deficit amount" for each fiscal year between 1986 and 1991. § 201(a)(1) (J.A. 104). It then requires the responsible officer to estimate the anticipated "budget base levels of total revenues and budget outlays" for a given fiscal year, in order to determine whether the projected deficit will exceed the "maximum deficit amount" for that year by more than a specified amount. He also must estimate the rate of real economic growth that will occur during the fiscal year and each of its quarters and the rate of real economic growth that occurred during each of the last two quarters of the preceding fiscal year. § 251(a)(1) and (b)(1)-(2) (J.A. 109, 116-118).

The Act further prescribes specific assumptions that are to be used in calculating the budget base. The responsible officer is directed to assume, with some specified exceptions, both "the continuation of current law in the case of revenues and spending authority" (§ 251(a)(6)(A) and (C) (J.A. 115-116)) and the existence of "appropriations equal to the prior year's appropriations except to the extent that annual appropriations or continuing appropriations for the entire fiscal year have been enacted" (§ 251(a)(6)(B)

(J.A. 115-116)). He is further directed to assume that "expiring provisions of law providing revenues and spending authority * * * do expire, except that excise taxes dedicated to a trust fund and agricultural price support programs administered through the Commodity Credit Corporation are extended at current rates" (§ 251(a)(6)(C) (J.A. 116)). See also § 251(a)(6)(D) (assumptions regarding federal pay and Medicare). The terms "budget outlays," "budget authority," and "deficit" are defined for these purposes by reference to provisions of the Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. 622(1), (2) and (6) (§ 257(2), (3) and (4) (J.A. 160-161)), and the term "real economic growth" is defined to mean "the growth in the gross national product during such fiscal year, adjusted for inflation, consistent with Department of Commerce definitions" (§ 257(6) (J.A. 161)).

Thus, the general contours of the calculations are established by reference to assumptions and definitions in this and other Acts. As the district court observed, the nature of the task is given additional content "by reference to years of administrative and congressional experience in making similar economic projections and calculations under the Congressional Budget Act of 1974" (J.A. 50 (footnote omitted); see 2 U.S.C. 602(a) and (f), 632(a), 639(c)). The President, with the assistance of the Director of OMB, also prepares estimates of future expenditures and receipts and submits them to Congress as part of his budget proposal. 31 U.S.C. (1976 ed.) 11; 31 U.S.C. 1105(a)(5) and (6). These pre-existing statutory provisions and the accumulated experience under them supply further guidance to the responsible officer in estimating revenues and outlays and the resulting budget deficit for the next fiscal year. See, *e.g.*, *Lichter* v. *United States*, 334 U.S. 742, 785-786 (1948); *Fahey* v. *Mallonee*, 332 U.S. 245, 250 (1947); *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 104-105 (1946); *Industrial Union Department* v. *American*

Petroleum Institute, 448 U.S. 607, 682-683 (1980) (Rehnquist, J., concurring in judgment); *Amalgamated Meat Cutters* v. *Connally,* 337 F. Supp. 737, 748 (D.D.C. 1971) (three judge court).[11]

2. Appellees Synar and NTEU object (Synar Br. 34-38; NTEU Br. 22-28), however, to the fact that the estimated federal receipts and expenditures—and, hence, the projected budget deficit—depend to a considerable extent on economic forecasts that are inherently uncertain and about which reasonable minds might differ. But that obvious truth does not disable Congress from vesting the Executive with the requisite authority. To the contrary, this Court repeatedly has recognized that administrative determinations frequently must be based on predictions about inherently uncertain events. See, *e.g., Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Insurance Co.,* 463 U.S. 29, 51-53 (1983); *Baltimore Gas & Electric Co.* v. *NRDC,* 462 U.S. 87, 102-103 (1983); cf. *Chevron U.S.A., Inc.* v. *NRDC,* No. 82-1005 (June 25, 1984). The Constitution permits Congress to call on the Executive "according to common sense and the inherent necessities of the governmental co-ordination" (*J.W. Hampton,* 276 U.S. at 406). And, in fact, this Court in the past has sustained other statutes that assigned comparably broad authority to an executive officer to make determinations that were likewise dependent upon judgments concerning the state of the economy. See *Yakus,* 321 U.S. at 420 (authority "to promulgate regulations fixing prices of commodities"); *Bowles* v. *Willingham,* 321 U.S. 503, 512, 514-515 (1944) (authority to institute rent controls).

[11] The district court also observed that "the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations" (J.A. 50). See *Sunshine Coal Co.* v. *Adkins,* 310 U.S. 381, 398 (1940) ("Certainly in the hands of experts the criteria which Congress has supplied are wholly adequate for carrying out the general policy and purpose of the Act.").

Accord *Amalgamated Meat Cutters* v. *Connally,* 337 F. Supp. at 746-747 (authority of the President to issue such orders and regulations as he deems appropriate "to stabilize prices, rents, wages and salaries").

3. Finally, appellees Synar and NTEU contend (Synar Br. 35-36; NTEU Br. 27-28) that the Act is unconstitutional because it effectively provides for the administrative modification of appropriations laws that will be enacted in the future. But as the district court noted (J.A. 46), this Court on a number of occasions has sustained laws that permitted executive officials to determine when, or whether, a law should take effect. See, *e.g., United States* v. *Rock Royal Co-Operative,* 307 U.S. 533, 577-578 (1939); *Currin* v. *Wallace,* 306 U.S. 1, 15-16 (1939); *Field,* 143 U.S. at 693; *The Cargo of the Brig Aurora,* 11 U.S. (7 Cranch) at 388. In such cases, Congress's action is properly viewed as "legislating in contingency" (J.A. 46), and it is Congress, not the Executive, that has determined that the future impact of the legislation will be shaped by administrative determinations it has both authorized and limited.[12]

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[12] Appellees Synar and NTEU also argue (Synar Br. 39-41; NTEU Br. 31-32) that the absence of judicial review of the threshold calculations supports a finding of unconstitutional delegation. However, the availability of review by a court has no logical bearing on whether Congress has unconstitutionally delegated *its* power. The importance of statutory standards, emphasized in Justice Harlan's dissenting opinion in *Arizona* v. *California,* 373 U.S. 546, 626 (1963), simply reflects the need to assure a suitable basis for judicial review where Congress has authorized it. Moreover, the only preclusion of review under the Act applies to "economic data, assumptions, and methodologies used by the Comptroller General in computing the base levels of total revenues and total budget outlays" (§ 274(h) (J.A. 166)). Appellees Synar and NTEU concede (Synar Br. 39; NTEU Br. 32) that these are not the types of matters that would appropriately be reviewable by a court in any event. Finally, as the court below pointed

4. Although the nature of the executive task required by the Balanced Budget and Emergency Deficit Control Act does not, in our view, render it an unconstitutional delegation of legislative authority, its character nevertheless does illuminate the distinct separation-of-powers defect in Section 251 that we address in our principal brief. For under Section 251 as now in effect, the Comptroller General—an officer of the Legislative Branch who is removable by Congress, not the President—has been authorized by Congress to make these difficult projections and determinations regarding government-wide receipts and expenditures and the overall budget deficit, and those determinations in turn have a pervasive and binding effect on the execution of the laws by the heads of all departments and agencies of the Executive Branch. Within the central sphere of the "executive Power," such an impact substantially undermines the unity, independence, and responsibility of the President that the Framers deemed essential to the sound execution of the laws and the welfare of the people.

The Balanced Budget and Emergency Deficit Control Act does not result in an unconstitutional delegation of legislative power. However, as explained in our principal brief, the judgment of the district court should be af-

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out (J.A. 53), the exercise of much administrative authority is insulated from judicial review. See, *e.g.*, *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-464 (1979); *Thompson* v. *Clark*, 741 F.2d 401, 404-405 (D.C. Cir. 1984). See also *Heckler* v. *Chaney*, No. 83-1878 (Mar. 20, 1985); *United States* v. *Erika, Inc.*, 456 U.S. 201 (1982).

firmed because Section 251 unconstitutionally assigns to the Comptroller General the responsibility for executing the deficit reduction provisions of the Act.

Respectfully submitted.

CHARLES FRIED
Solicitor General

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Nos. 85-1377, 85-1378, and 85-1379

IN THE

Supreme Court of the United States

October Term, 1985

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Appellant,
v.
Mike Synar, Member of Congress, *et al.,*
Appellees.

United States Senate,
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Thomas P. O'Neill, Jr., Speaker of the United States House of Representatives, *et al.,*
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On Appeals from the United States District Court for the District of Columbia

BRIEF *AMICUS CURIAE* OF WILLIAM H. GRAY III ET AL., MEMBERS OF CONGRESS

RICHARD A. WEGMAN*
PAUL S. HOFF
THOMAS H. STANTON
JANNE G. GALLAGHER

Wellford, Wegman, Krulwich & Hoff
1775 Pennsylvania Ave., N.W.
Suite 450
Washington, D.C. 20006
202/775-0200
Attorneys for William H. Gray III *et al.,* Members of Congress

*Counsel of Record

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QUESTION PRESENTED

Does the Balanced Budget and Deficit Control Act, which assigns to the Comptroller General the power to set overall spending levels for federal programs and departments, involve an unconstitutional delegation of Congress' power under article I, Section 9 of the Constitution to ensure that "No money shall be drawn from the Treasury, but in consequence of Appropriations made by law"?

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**On Appeals from the United States District Court
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BRIEF *AMICUS CURIAE* OF WILLIAM H. GRAY III ET AL., MEMBERS OF CONGRESS

William H. Gray, III, Member of Congress from Pennsylvania, and Chairman of the Committee on the Budget of the U.S. House of Representatives, respectfully submits

this *amicus curiae* brief in support of Appellee's position that the judgment of the District Court[1] should be affirmed. Mr. Gray is joined on this brief by Representatives Jack Brooks, John Conyers, Jr., Thomas J. Downey, Paul E. Kanjorski, Mike Lowry, Bruce A. Morrison, Mary Rose Oakar, Patricia Schroeder, Edolphus Towns, Bruce F. Vento and Ted Weiss. Written consent to the filing of this brief has been obtained from all parties, and copies of those consent letters have been filed with the Clerk of this Court.

IDENTITY AND INTEREST OF THE *AMICI CURIAE*

Amicus William Gray has been a Member of Congress for 8 years, and has been Chairman of the House Committee on the Budget since 1985. As Budget Committee Chairman, Mr. Gray was a key member of the House-Senate Conference Committee that wrote the Balanced Budget and Emergency Deficit Control Act of 1985.[2]

Amicus Jack Brooks has been a Member of Congress since 1953, and since 1975 Chairman of the Government Operations Committee, which has legislative jurisdiction over the acts governing the congressional budget process. Mr. Brooks, whose views on the Deficit Control Act's constitutionality are further explained in the 1985 volume of the Texas Law Review, was an active participant in congressional consideration of the Act.

The other *amici* are all members of the 99th Congress who participated actively in House deliberations leading to passage of the Deficit Control Act. They include members of the House-Senate conference in which the provisions of the Deficit Control Act were developed and agreed upon.

[1] *Synar v. United States*, No. 85-3945 (D.D.C. Feb. 7, 1986), J.A. 27.

[2] Pub. L. No. 99-177, 99 Stat. 1037 (1985) (hereinafter the "Deficit Control Act" or "the Act"), J.A. 103.

As members of Congress who were directly involved in the development of the balanced budget legislation, we are committed to making it work effectively. We are familiar with the considerations that dictated the decision to allocate automatic spending reduction responsibilities to the Office of Management and Budget, the Congressional Budget Office and the General Accounting Office (Section 251 of the Deficit Control Act). We are also familiar with the development of the fallback provision (Section 274(f) of the Deficit Control Act) which takes effect if the Act's "trigger mechanism" is declared unconstitutional, and are in a position to assess the viability and workability of this fallback mechanism.

In addition, we have a direct stake in the outcome of this litigation. As the District Court found[3], if the automatic spending reduction provisions of the new law are upheld, they would interfere with the ability of members of Congress to participate in decisions on raising revenue and authorizing appropriations for government programs.

As members of Congress, we fully support the fundamental goals of the Deficit Control Act. A national debt that now exceeds $2 trillion — nearly triple the level of just 10 years ago — threatens to impair the Nation's economic vitality and our standing as one of the world's foremost industrialized powers. It is imperative that the Nation take steps to control deficits of this magnitude, lest the next generation be left with a standard of living significantly lower than we currently enjoy.

However, while we support the goals of the Deficit Control Act, we believe the Act entails an unconstitutional abdication of the congressional responsibility for spending decisions. Under the Constitution, the Comptroller General cannot be assigned the power to determine overall spending

[3] *Synar v. United States, supra* note 1 at J.A. 78.

limits for federal programs and agencies; only Congress and the President together can exercise that power. The Comptroller General's involvement in the sequestration process must be eliminated, and the alternative procedure provided by Congress in Section 274(f) of the Act should be permitted to take effect.

Based on our experience in Congress, we believe the budget reduction goals of the Deficit Control Act can best be achieved without reliance upon the Act's constitutionally flawed provisions.

SUMMARY OF ARGUMENT

Under article I of the Constitution, fundamental responsibility for the raising of revenue and the authorization of appropriations is committed to the legislative branch.[4] The policy judgments inherent in revenue and spending decisions are central to the most basic of legislative powers. The exercise of these powers is inevitably influenced by the political philosophy and affiliations of legislators individually, and of the legislature as a body. When Congress abdicates these powers and responsibilities to an agency not solely within the legislative branch, as it has done here, the statute violates the opening words of article 1 of the Constitution, which prescribes that "[a]ll legislative powers herein granted shall be vested in a Congress of the United States."[5].

[4]U.S. Const. art. I, §§ 8 & 9.

[5]U.S. Const. art. I, § 1. We do not mean to imply that the assignment of these powers to an office *within* the legislative branch – the Congressional Budget Office, for example – would be any more proper. As we see it, the principal vice in the Deficit Control Act is the wholesale abdication of decision-making authority over spending levels, which the Constitution empowers the Congress – and only the Congress – to set through the normal legislative process.

This is especially so in this case because Congress has improperly conferred inherently legislative functions upon the Comptroller General without providing clear standards to guide him in the exercise of these broad powers. Therefore, the provision giving the General Accounting Office (hereinafter GAO) sequestration powers must fall as an excessive delegation of legislative authority.

We thus agree with the decision of the District Court below that the Deficit Control Act is unconstitutional, but on different grounds. The District Court, as we read the opinion, found the Act defective on the theory that much of the power involved here is executive in nature, and thus cannot be exercised by an officer over whom Congress exercises a substantial measure of control — particularly, the power to participate in that officer's removal.

Our view of the Deficit Control Act is somewhat different. The vice is not in the hybrid nature of the Comptroller General's office; indeed, given the number of legislative-related functions assigned to the Comptroller General by other existing law, we view it as entirely warranted that Congress has retained the levers of control contained in a number of statutes enacted by Congress beginning in 1921. Rather, the vice here lies in the wholesale abdication of Congress' authority to set overall spending levels for agencies and programs — an abdication which Congress could no more assign to the President, or to an officer directly accountable to the President, than it can to a hybrid agency such as the General Accounting Office. In short, the fault is not in the *recipient* of this extraordinary grant of authority; it is in the *act of delegating* such wide-open authority in the first place.

If this Court were to endorse the reasoning of the District Court below and find that Congress' control over GAO invalidates the assignment of powers to the Comp-

troller General, it would be inappropriate to "save" the Deficit Control Act by invalidating the removal provisions of the Budget and Accounting Act of 1921.[6] There can be little doubt, as the District Court noted, that the fact the Comptroller General is by law an officer responsive to the needs and wishes of the Congress was a key element in the House-Senate compromise reached on the Act.[7] We think it extremely unlikely that Congress could have reached a compromise on the Deficit Control Act without this provision. Congress was unwilling to assign the far-reaching sequestration functions to the President of the United States, to the Office of Management and Budget, or to any other agency or official in the Executive Branch. The Comptroller General was chosen precisely because he is an officer accountable to the Congress, nominated by the President from names submitted by Congress, and subject to removal by joint resolution passed by Congress.

We believe it would violate the intent of Congress if this Court sought to save the Deficit Control Act by striking down the removal provision of the 1921 Act, a law that has stood on the books for sixty-five years. Such a step would also lead, without any basis in law, to a fundamental reordering of the entire relationship between Congress and GAO.

Finally, we do not believe that GAO's role in the sequestration process need be saved on the grounds of legislative necessity. Congress specifically provided for a legislative fallback to the GAO authority which we believe can be equally effective in achieving the Deficit Control Act's important goals. Under the fallback procedure, a Temporary Joint Committee promptly reports a Joint Reso-

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[6]Budget and Accounting Act of 1921, Pub. L. No. 13, ch. 18, 42 Stat. 20 (1921) (31 U.S.C. §§ 701, *et seq.*) (hereinafter the "1921 Act"), J.A. 93.

[7]*Synar v. United States, supra* note 1 at J.A. 60-61.

lution to the House and Senate floors, and Congress, not GAO, approves the across-the-board cuts needed to meet deficit targets.

In our judgment, this fallback provision is a logical extension of the provisions and procedures of the Congressional Budget and Impoundment Control Act of 1974,[8] and is a sound alternative to the role provided GAO in the Deficit Control Act. If the underlying budget and appropriations cycle fails to meet the budget targets, the fallback procedure will significantly improve the ability of Congress to achieve the targets by avoiding separate program-by-program review of spending. This is the type of review which frequently resulted in legislative logjams under prior laws.

Therefore, an otherwise unconstitutional delegation of authority to GAO need not be upheld for fear that it represents the only possible way for the Nation to reduce the budget deficit. The fallback procedure is a workable alternative to the GAO provisions of the Act, one which should enable the Nation to meet the law's deficit reduction targets in a manner that is consistent with the Constitution.

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[8] Pub. L. No. 93-344, § 1016, 88 Stat. 335 (1974), 2 U.S.C. § 687 (1982) (hereinafter the "Budget Act").

ARGUMENT

I.

Control of spending is inherently a legislative power, involving major policy decisions and trade-offs, which the Act unconstitutionally delegates without clear standards to GAO.

It is our experience as members of Congress that estimating the likely budget deficit, and deciding on the basis of that estimate appropriate spending levels, is a highly subjective and political task. Making such judgments is the essence of the legislative process. Responsibility for these policy decisions cannot be constitutionally delegated, certainly not without clearer standards than provided by the Deficit Control Act.

A. Decisions involving the scope and magnitude of the federal deficit, such as have been delegated here, are inherently political and subjective in nature.

The Deficit Control Act grants the Comptroller General the authority to determine the likely size of the deficit, and therefore the amount each federal agency can spend in the coming fiscal year. The Act empowers GAO to review the estimates made by both OMB and CBO, and to make its own judgments about economic growth, outlays and revenue levels, and savings likely to be achieved in programmatic spending.

After concluding how much overall spending, in its opinion, must be cut in order to meet the Act's deficit targets, GAO will determine the amount by which spending for each program, project or activity must be reduced. This GAO determination, which the President must then adopt without change, will override any existing law to the con-

trary. It will amend appropriation bills previously passed by Congress. It will override any substantive laws passed at any time in the past by Congress which might conflict with the requirement to reduce spending by a specific amount. It will amend both controllable expenditures and entitlement programs. For all practical purposes, GAO's action is the functional equivalent of a major, omnibus piece of legislation that Congress would pass only after careful consideration.

In undertaking this role, GAO will be making highly subjective and political judgments. Forecasts of budget deficits are based on projected revenues and expenditures. Both are heavily influenced by a variety of complex economic factors. Chief among these are interest rates, closely followed by unemployment and inflation rates, the trade deficit, and intervening factors such as the recent sharp decrease in the world price of oil. The budget process itself will change government programs, and these changes will make economic projections still more difficult. Budget deficit forecasts are even more uncertain because they must be made several months before the start of the fiscal year to which they pertain.

In some years OMB and CBO estimates of economic growth have been close; in other years they have differed markedly. In 1983, for example, OMB predicted that the economy would grow by 1.4%, while CBO suggested the level of GNP growth would be 2.1%, a figure that is 50% larger. In fact both predictions were wrong, and growth for the year was actually 3.5%.[9].

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[9]Executive Office of the President, Office of Management and Budget, *Budget of the United States Government, Fiscal Year 1984*, *2-9 (Jan. 1983);* Congressional Budget Office, *Baseline Budget Projections for Fiscal Years 1984-1988*, 9 (Feb. 1983); U.S. Department of Commerce, *Survey of Current Business*, 20 (Feb. 1986).

These errors translate into actual dollar amounts of substantial magnitude. A variation of one percentage point in the growth of the GNP, for example, changes the deficit by about $5 billion.

The fact is that both agencies have been consistently off in their forecasts by an average of about one percent in the years 1976 through 1984. *Neither* OMB nor CBO accurately forecast actual GNP growth in a single year.[10]. The deficit for this year promises to be equally hard to predict. For example, CBO believes the FY '87 deficit will be $16.1 billion higher than does the Administration.[11]

Minor changes in forecasts will in turn substantially alter the program cuts required under the sequestration process. A change of one percent in the projected interest rate may alter next year's predicted deficit, and the size of required federal cuts, by as much as $9 billion.[12].

According to Congressman Jack Brooks, Chairman of the Committee on Government Operations, budget forecasts amount to little more than educated guesses. "[T]hey are highly subjective judgments concerning many different factors, often involving arbitrary numbers and assumptions," and as such they may be "susceptible to political manipulation."[13]

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[10] *The Balanced Budget and Emergency Deficit Control Act: Hearings on H.J. Res. 372 Before the House Committee on Government Operations,* 99th Cong., 1st sess. (Oct. 17, 1985) (statement of L. Fisher, 161, Table 1) (hereinafter the "House Hearings").

[11] Congressional Budget Office, *An Analysis of the President's Budgetary Proposals for Fiscal Year 1987,* xv, Feb. 1986.

[12] Congressional Budget Office, *Economic and Budget Outlook: Fiscal Year 1987-1991: Report to the House and Senate Budget Committees,* Part I, 72 (Feb. 1986).

[13] Brooks, *Gramm-Rudman: Can Congress and the President Pass the Buck?,* 64 Tex. L. Rev. 131, 141, 153 (1985).

CBO, responsible for budget estimates under the Budget Act, is well aware of the politicl judgments inherent in forecasting the size of deficits. At House hearings in October 1985, CBO Director Rudolph Penner told Congress, "Well, sir, our real growth estimates have been somewhat more accurate [than those of OMB]. We have not won on every variable, but I do think it probably behooves any administration to set an optimistic tone. . ."[14] Penner noted "there is a wide enough array of forecasts on the street at any one moment that you can rationalize a wide set of choices."[15] He urged that there should be a legislative check to protect against the possibility of "irresponsible or incompetent" forecasts by OMB or CBO.[16]

But there is no legislative check here. For GAO to be making a judgment that is so "distinctively political,"[17] beyond the control of elected officials, in our opinion is contrary to sound public policy, and violates basic constitutional precepts governing allocation of powers among the branches of government.

B. Congress cannot constitutionally delegate such broad policy-making power, especially without adequate standards to guide its decisions.

The Constitution places authority to determine federal spending levels squarely in the hands of Congress. Article 1, Section 9, states "No money shall be drawn from the Treasury, but in consequence of Appropriations made by

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[14]House Hearings, *supra* note 10 at 160.

[15]*Id.* at 187.

[16]*Id.* at 181.

[17]On this key point our view differs from that of the District Court below. *Synar v. United States, supra* note 1 at 43-44.

law." Congress alone can make those laws. If there are to be any meaningful limits on the types of legislative responsibilities Congress can delegate, establishing spending limits must be one of "those important subjects, which must be entirely regulated by the legislature itself . . ."[18]

The powers delegated here are inherently legislative in nature. They cannot be exercised without making broad political and policy judgments which are the hallmark of legislation. Because these ultimate powers have been delegated without standards to the Comptroller General who, unlike Congress and the President, is not responsible to the electorate, we believe the section of the Act giving GAO sequestration power must fall.

We therefore take issue with the opinion of the District Court in this case, which suggested that GAO's role in the sequestration process was an executive branch function because it involved the "sort of power normally conferred upon the executive officer charged with implementing the statute."[19] We believe this does not properly take into account the extraordinary type of legislative authority involved here, and the highly judgmental nature of GAO's role in the deficit reduction process discussed above.

In making these judgments, GAO will decide how much the federal government will spend in any fiscal year, and may order the override of a myriad of laws in the process. These decisions can affect billions of dollars of spending by a wide variety of agencies. For example, CBO's estimate for the current year is that the deficit will be $181.3 billion. Budget outlays would therefore have to be cut by

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[18] *Wayman v. Southard,* 23 U.S. (10 Wheat.) 1, 42-43 (1825). *See also, Harrington v. Schlesinger,* 528 F.2d 455 (4th Cir. 1975); *Massachusetts v. Laird,* 451 F.2d 26 (1st Cir. 1971).

[19] *Synar v. United States, supra* note 1 at J.A. 72.

$37.3 billion to meet the Act's deficit target. If GAO happens to agree with the CBO estimate, it will mean $18.0 billion in defense cuts, and $19.3 billion in non-defense spending cuts, thereby affecting most federal agencies and programs.

Thus, our objection is to the nature of the delegation involved here, not to the way GAO is structured. In our view, there is nothing inappropriate about the way GAO is constituted, or about the fact that it performs "significant duties that are both 'legislative' and 'non-legislative', i.e. executive, in nature."[20] GAO's hybrid nature is analogous to the position occupied by independent regulatory agencies, whose status and method of operation has been repeatedly sanctioned by this Court.[21]

[20] *Ameron Inc. v. U.S. Army Corps of Engineers*, Nos. 85-5226 and 85-5377, Slip Op. at 5 (3d Cir. March 27, 1986).

[21] *Yakus v. U.S.*, 321 U.S. 414 (1944); *Humphrey's Executor v. U.S.*, 295 U.S. 602 (1935). In this regard, we believe Congress has properly utilized independent regulatory agencies to discharge a wide variety of functions. These agencies set rates, award routes, issue licenses, enforce standards, and make determinations under their various enabling statutes — functions that have been characterized as quasi-legislative (rate-making and rule-making activity), quasi-executive (administrative and enforcement activity) and quasi-judicial (interpretative and adjudicative activity). Although members of regulatory commissions are appointed by the President, the fact that they serve for set terms and are removable only for cause significantly insulates them from executive control.

In its decision in *Humphrey's Executor*, this Court upheld the independent agency concept. Speaking of the Federal Trade Commission the Court said, "Such a body cannot in any proper sense be characterized as an arm or eye of the executive. Its duties are performed without executive leave, and, in the contemplation of the statute, must be free from executive control." 295 U.S. at 628.

Although the powers of an independent regulatory commission are not at issue here, the District Court's opinion questions *Humphrey's Executor* and the cases that follow it, and suggests that this Court should reconsider the concept of hybrid agencies that combine quasi-executive, quasi-judicial and quasi-legislative functions under a com-

It would make no difference, in our view, if GAO were purely an executive branch agency, or purely a legislative branch agency for that matter. Under the Constitution the broad powers involved here can only be exercised by one entity in our system — the Congress itself, acting through the normal legislative process, authorizing and appropriating overall spending levels for federal departments and agencies.

Of course Congress could agree to change the Constitution itself, as the President has requested, to provide the Executive with line-item veto authority. But thus far Congress has declined to grant such authority. Until it does, or until it changes the Constitution in some other way, the authority to set spending limits cannot be transformed into a "quasi-executive" function by the simple expedient of enacting a law purporting to delegate the authority to some agency. Otherwise, no legislative function would be beyond the ability of Congress to transform into an executive function.[22]

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mon roof with some degree of independence from executive branch control. *Synar, supra*, note 1 at 68-70.

We disagree. In our view *Humphrey's Executor* was good law in 1935, and it is good law today. In order to accommodate the workings of modern government, it is necessary that Congress be permitted to utilize such agencies to carry out the mix of functions assigned to them; it is also desirable to be able to provide a degree of independence from political intrusion as these decision-making powers are exercised.

[22]We concur in the warning sounded by Louis Fisher, an expert on both the Constitution and the budget, when Congress was considering the legislation, "I am hard pressed to think of another statute that makes such sweeping changes in the balance between branches. No other bill, to my knowledge, represents such a clear abdication of fiscal powers heretofore exercised by Congress and part of its responsibilities under Article 1 of the Constitution." House Hearings, *supra*, note 10 at 203.

The constitutional invalidity of the delegation in this case is further underlined by the lack of any standard governing GAO's actions. In exercising its sweeping powers GAO will be making predictions both value-laden and legislative in nature about the course of the economy which are the antithesis of the normal executive branch application of known facts to the mandates of a statute. No standards in the Act restrict GAO from basing its predictions on whatever economic or political grounds it may choose. It may direct the President to cut spending by whatever amount it chooses, without regard to whether its projection is similar to the numbers in the report prepared by CBO and OMB. It may act without fear of judicial challenge.

The delegation under review here is parallel in key respects to the scheme this Court struck down in *Schechter Poultry v. U.S.*[23] In *Schechter* the law authorized the President to approve detailed codes governing a wide variety of businesses subject to federal authority. The *Schechter* case was characterized by the broad scope of the legislative powers delegated, as well as by the lack of standards attending the delegation.[24] In this case, the delegation authorizing the Comptroller General to direct spending cuts affecting practically every citizen is equally broad. As in *Schechter,* the delegation is accompanied by few or no standards. The breadth and type of the delegation involved in this case thus places it directly within the *Schechter* ruling, and distinguishes it from the post-*Schechter* cases in which the courts have declined to hold delegations unconstitutional.[25]

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[23]295 U.S. 495 (1935).

[24]1 K. Davis, *Administrative Law Treatise* §3:8 at 176 (2d ed. 1978).

[25]*Amici* endorse the more extensive discussion of this point contained in the brief of appellees, Mike Synar *et al.*

For these reasons, we believe the grant of such unprecedented powers to fix overall spending limits for federal agencies and programs — whether those powers are granted to an officer of the executive branch, or, as here, to a hybrid agency — must be struck down as an unconstitutional delegation of congressional authority. Only Congress, "in consequence of Appropriations made by law," can establish those spending limits.[26]

II

Long-standing Congressional Intent Bars Striking Down Congressional Removal Powers Over the Comptroller General.

Several parties to this case suggest that if the Court finds that GAO's role in the sequestration process is unconstitutional because of the potential congressional role in removing the Comptroller General from office, the appropriate remedy would be to strike down the provisions of the 1921 Act giving Congress a role in the removal of the Comptroller General.[27] We believe such a result would be inconsistent with congressional intent. Congress' intent is amply demonstrated both by the legislative history of the Deficit Control Act, and by the development of the earlier law by which the Comptroller General's office was created and various functions assigned to it.

The legislative history of the Deficit Control Act demonstrates that the House of Representatives rejected the idea of delegating sequestration authority to an agency fully controlled by the Executive. In its version of the bill, the House vested authority solely in CBO, subject to an obligation to consult with OMB.[28] In doing so, the House

[26] U.S. Const., art. I, § 9.

[27] *See* the 1921 Act, *supra* note 6 at 6, § 302.

[28] H.R. Rep. No. 433, 99th Cong., 1st Sess. 72 (1985).

rejected the original Senate proposal that the Directors of OMB and CBO have dual authority to make the operative determination under the Act. Had the Senate insisted on vesting final authority in an agency subject to exclusive Presidential control, we believe no legislation would have been enacted.

In enacting the Deficit Control Act, Congress selected the GAO precisely because it was the agency outside of the legislative branch most responsive to the control of Congress.[29] Congressional involvement in the removal process was central to this decision. To conclude otherwise would be to ignore the conscious efforts of Congress over the past sixty-five years to exercise increasing control over GAO.

In 1921, the Congress created the General Accounting Office and transferred many of the functions of the Comptroller of the Treasury to the new head of the GAO, the Comptroller General of the United States. The 1921 Act specified that the GAO would be "independent of the executive department." It provided for appointment of the Comptroller General by the President, but retained for Congress the power to remove the Comptroller General by joint resolution.[30]

After World War II, the Congress brought the GAO into a yet closer relationship. The Reorganization Act of 1945 declared GAO to be "a part of the Legislative Branch."[31] In that act, Congress removed GAO's budgets, like those of other congressional agencies, from OMB review. In the Ethics in Government Act of 1978, Con-

[29] *See e.g.*, 131 Cong. Rec. H9597-98 (daily ed. Nov. 1, 1985) (Statement of Rep. Rostenkowski).

[30] The 1921 Act, *supra* note 6 at 6, §§ 302 & 306.

[31] Act of Dec. 20, 1945, ch. 582, Tit. 1, § 7, 59 Stat. 613.

gress again took the occasion to define the GAO as a part of the legislative branch for purposes of that act.[32]

In 1980, the Congress enacted legislation[33] requiring the President to appoint the Comptroller General from among a congressionally selected list of nominees. Thus, Charles Bowsher, the incumbent Comptroller General, was selected by President Reagan in 1981 from among the nominees submitted by members of Congress in accordance with the provisions of this legislation.

Congress has thus built on the basic 1921 Act to create a close working relationship with GAO. To declare the 1921 removal provision unconstitutional after all these years would destroy one of the basic blocks on which that close relationship rests. We do not believe that Congress, without any hearings or any discussion, intended to compromise its entire relationship with GAO in order to save the sequestration process from constitutional difficulty.

To the contrary, there is clear affirmative legislative evidence that, if the role of GAO in the sequestration process were held unconstitutional, Congress intended the Temporary Joint Committee to be used instead. As discussed in the next section, this process provides a fully effective alternative way of accomplishing sequestration.

In the Conference Report accompanying the Deficit Control Act, the conferees stated:

> The Conferees do not believe that any constitutional authority or requirement to avoid sequestration of any federal spending exists, but have included this provision as a "Fail Safe"

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[32]Pub. L. No. 95-521. Tit. I, §101, 92 Stat. 1824, (1970), 2 U.S.C. § 701(e) (1982).

[33]Pub. L. No. 96-226, 94 Stat. 314 (1980), 31 U.S.C. § 703 (1982).

mechanism against a successful contrary claim upsetting the balanced provisions of the Act.[34]

As one of the leading supporters of the Deficit Control Act said on the floor of the House during debate of the measure:

> 'In the event that the CBO, OMB, GAO trigger mechanism is found unconstitutional, the Senate version has a fallback provision, a clearly constitutional expedited joint resolution process.' So they even built in their package that we are going to be considering further this option that if it should be held unconstitutional, there would be this backup provision.[35]

Thus, there is clear indication that Congress intended that this Court rely upon the fallback provision specifically provided in case of constitutional infirmity, rather than reaching to strike down a long-standing provision of law that Congress has buttressed and reinforced over the past sixty-five years.

III

The Effectiveness of the Deficit Control Act is not Dependent on Retaining GAO's Role in the Sequestration Process.

In prior cases where delegations have been upheld, a key factor has been the pragmatic need for Congress to assign to others the filling-in of details within broad legislative parameters.[36] Such pragmatic necessity is not involved in this instance. Indeed, Congress in the Deficit Control Act

[34] H.R. Rep. No. 433, 99th Cong. 1st Sess. 100 (1985).

[35] 131 Cong. Rec. H.9866 (daily ed. Nov. 7, 1985) (Statement of Rep. Lott).

[36] *United States v. Grimaud,* 220 U.S. 506, 517 (1911); *Lichter v. United States,* 334 U.S. 742, 779 (1948).

has provided new *congressional* procedures for dealing with deficits, and has established in the Act a *congressional* fallback procedure to take the place of the GAO role in the sequestration process in case the delegation to the GAO did not pass constitutional muster. As discussed below, this fallback provision can be a fully effective substitute for the involvement of GAO.

A. Even apart from the sequestration provisions, the Deficit Control Act significantly tightens the procedures of prior law.

Entirely apart from the sequestration process, the Deficit Control Act contains a number of provisions designed to significantly tighten the law's procedures. Under the Budget Act prior to its amendment by the Deficit Control Act, Congress had the option of utilizing a second (binding) budget resolution to accommodate changes in economic or technical assumptions, as well as policy initiatives not assumed in the first (target) budget resolution. It could call for lower spending or higher revenues to enforce its earlier deficit goal. In practice, in the second budget resolution, Congress usually reaffirmed the targets or revised the first budget resolution to acknowledge larger deficits, rather than attempting another round of budget cuts to meet the earlier goal.

The Deficit Control Act takes away the latitude provided to Congress by the second budget resolution process. Thus, even apart from GAO's role in the "trigger" mechanism, the Act establishes major new controls to reduce budget deficits and correct problems with the budget process in recent years. In particular, Section 201 of the Act commits the Congress to annual deficit reduction targets. Section 251 commits the Congress to achieving those targets by adopting proportional across-the-

board cuts of programs and activities. By committing itself to this approach in the event that it was otherwise unable to achieve the targets through the usual priority-setting process, Congress agreed to forego the program-by-program effort which has proved politically so difficult in the past.

To achieve these policy goals, the Deficit Control Act, as it amended the Budget Act, adopts a system of mutually reinforcing procedural steps to ensure reductions wholly apart from GAO-directed sequestration orders. Thus, Section 301(i) of the Budget Act as amended bars the Congress from adopting any budget resolution with a deficit exceeding the target level, and permits waiver of the rule only by a three-fifths vote. Section 310(d) requires that amendments to the budget reconciliation bill be neutral in impact upon the deficit, and Section 302(f) prohibits House or Senate consideration of legislation that would cause a committee to exceed its budget allocation. Further, Section 310(d) provides that any budget reconciliation bill providing new budget or entitlement authority are subject to motions to strike.

The Deficit Control Act also changes legislative priorities to discourage spending bills that might exceed budget targets. Section 302(c) of the Budget Act as amended prohibits House and Senate committees from reporting spending or credit legislation until they have allocated their budget, entitlement and credit authority among subcommittees or programs.

Finally, Sections 300 and 301 of the Budget Act as amended accelerate the budget timetable, and provide for only a single binding concurrent budget resolution (rather than the two required under prior law). This will encourage completion of congressional budget action, in-

cluding appropriations and reconciliation bills, before the automatic spending reductions would be triggered.

All of these measures represent an extraordinary congressional commitment to deficit reduction, accomplished at the cost of prerogatives traditionally accorded congressional committees and their leaders.

B. The fallback sequestration procedure provides additional assurance that Congress will reach agreement on the budget targets.

It is in this larger context that Section 274(f) of the Deficit Control Act provides an effective fallback to implement the across-the-board cuts should GAO's role be held unconstitutional. Under the fallback process a Temporary Joint Committee on Deficit Reduction is established, consisting of the membership of the Budget Committees of the House of Representatives and the Senate. Members of other Committees are not involved to avoid problems arising in past House-Senate budget reconciliation conferences, which have involved as many as 250 members of Congress. The Chairmen of the two budget committees act as Co-Chairmen of the Joint Committee.

Under the fallback provision, the Joint Committee, rather than the Comptroller General, will receive the report of the Directors of the Congressional Budget Office and the Office of Management and Budget. Not later than five days after its receipt of the Directors' report, the Joint Committee must report a joint resolution to the House and to the Senate reflecting the contents of the Directors' reports.

Thereafter, consideration of the joint resolution follows the special procedures relating to the consideration of a joint resolution under Section 254(a)(4) of the Act except

that floor debate is limited to two hours in each House. The joint resolution is not amendable, debate is limited, and a vote on final passage must be taken within five days after the resolution is reported. The new process guarantees expedited consideration of the joint resolution. Upon enactment, the joint resolution will have the same effect as was intended for the Comptroller General's report to the President, and the sequestration process will begin.

The new fallback procedure should be compared to the prior process. Before the Deficit Control Act, the only binding legislative vehicle utilized to achieve overall spending limits (other than the regular appropriations bill) was the reconciliation bill, which made all changes in permanent law required by any targets set in the various budget resolutions. The reconciliation bill was handled under relatively traditional congressional procedures: the resolution was reported to the House and Senate by the separate budget committees of the two houses; on the Senate floor the legislation was fully open to amendment, on the House floor amendments were permitted according to the usual resolution governing debate; a House-Senate conference committee was needed to hammer out differences between the two bodies; and there was nothing whatsoever to guide the Congress in allocating reductions among the various federal departments and programs.

The joint committee fallback procedure avoids most of these legislative pitfalls. By utilizing the joint committee mechanism, Congress will avert many of the inefficiencies and delays inherent in bicameralism: a *single* resolution will be reported to the House and Senate floors; the resolution is not subject to amendment during floor consideration; and Congress is governed by the strict guideline that cuts must be made in federal agencies and programs on a

pro rata, across-the-board basis with very limited exceptions. This last factor, in particular, will help ensure that members will not try to protect their particular pet agencies or legislative programs through legislative "horse trading" or outright opposition to a specific provision cutting spending for a particular agency. To a significant degree, the joint committee fallback procedure will enable Congress to operate with the discipline and unity enjoyed by a unicameral legislature, and the chances that the House and Senate will both *begin* and *end* with the same set of numbers are vastly increased; this in turn greatly increases the chances that Congress will approve the required sequestration process.

Congress does not lightly establish joint committees, even those which are temporary in nature. To give a joint committee the power to report a joint resolution is extraordinary indeed.[37] Congressional reluctance to establish joint committees is rooted in bicameralism and the committee process. Legislators are understandably jealous of the prerogatives of their respective Houses and of already established committees.[38] The two most important factors in the establishment of a joint committee, even one without legislative authority, are: (i) a crisis, national or international, which both Houses seek to resolve jointly, and (ii) support for the creation of a joint committee to give visibility and attention to the problem.[39]

Virtually the only precedent for a joint committee with legislative authority is the Joint Committee on Atomic

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[37]*Deschler's Precedents of the United States House of Representatives*, H.R. Doc. No. 94-661, 94th Cong., 2d Sess. 337 (1974).

[38]Oleszek, *House-Senate Relationships: Comity and Conflict*, 411 Annals of the Am. Acad. of Pol. and Soc. Sci. 75, 82 (1974).

[39]*Id.* at 84.

Energy which was established on August 1, 1946 and abolished on September 20, 1977.[40] The continuing need for secrecy following World War II and the importance of atomic energy research led to the formation of this committee.[41] The Joint Committee on Atomic Energy was once described as follows:

> The Joint Committee on Atomic Energy is, in terms of its sustained influence in Congress, its impact and influence on the Executive, and its accomplishments, *probably the most powerful Congressional committee in the history of the nation.*[42]

There is similar reason to expect that the Joint Committee established by the fallback provision would be equally powerful and effective.

The Deficit Control Act, by adopting all the procedures described above, promises to improve greatly the congressional budget process. In our judgment, the budget process can and will work effectively without assigning GAO a pre-eminent role in establishing spending levels for federal programs and agencies, a role which is unprecedented in our nation's constitutional history.

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[40]Pub. L. No. 95-110, 91 Stat. 884, §301 (1977), 42 U.S.C. §2258 (1982).

[41]H. Green & A. Rosenthal, *The Joint Committeee on Atomic Energy* 4 (1961) (quoted in Oleszek, *supra* note 38 at 83).

[42]*Id.* at p. 4. Emphasis added.

CONCLUSION

For the foregoing reasons, *amici* urge that the judgment of the District Court be affirmed.

Respectfully submitted,

RICHARD A. WEGMAN*
PAUL S. HOFF
THOMAS H. STANTON
JANNE G. GALLAGHER
Wellford, Wegman, Krulwich & Hoff
1775 Pennsylvania Ave., N.W.
Suite 450
Washington, D.C. 20006
202/775-0200
Attorneys for William H. Gray III
et al., Members of Congress

*Counsel of Record

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Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANTS

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

On Appeals from the United States District Court for the District of Columbia

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BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS; PUBLIC EMPLOYEE DEPARTMENT, AFL-CIO; AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO; AMERICAN POSTAL WORKERS UNION, AFL-CIO; and NATIONAL ASSOCIATION OF LETTER CARRIERS, AFL-CIO AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

ROBERT M. WEINBERG
PETER O. SHINEVAR
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Amici Curiae

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

[Attorneys for Individual Unions Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

60

EDWARD J. HICKEY, JR.
THOMAS A. WOODLEY
1125 15th Street, N.W.
Washington, D.C. 20005
Counsel for Public Employee Department, AFL-CIO

MARK ROTH
80 F Street, N.W.
Washington, D.C. 20001
Counsel for American Federation of Government Employees, AFL-CIO

DARRYL J. ANDERSON
ANTON G. HAJJAR
1400 Eye Street, N.W.
Washington, D.C. 20005
Counsel for American Postal Workers Union, AFL-CIO

BRUCE H. SIMON
330 West 42nd Street
New York, NY 10036
Counsel for National Association of Letter Carriers, AFL-CIO

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AS *AMICI CURIAE* IN SUPPORT OF APPELLEES

This brief *amici curiae* is filed with the consent of the parties, as provided for in the Rules of the Court.

INTEREST OF THE *AMICI CURIAE*

The American Federation of Labor and Congress of Industrial Organizations is a federation of 94 national and international unions with a total membership of over 13,000,000 working men and women. The Public Employee Department is composed of 30 of the AFL-CIO's affiliated unions with a total membership of some 2,000,000 public employees. The American Federation of Government Employees, the American Postal Workers Union, and the National Association of Letter Carriers are each AFL-CIO affiliate unions whose members are current or former federal employees. Employees who are represented by these and other of AFL-CIO's affiliate unions have been and will be directly affected by spending reductions required under the Balanced Budget and Emergency Deficit Control Act of 1985.[1]

[1] AFGE has filed a separate suit challenging the Act's so-called "fallback" mechanism for the sequestration of funds. *AFGE v. United States*, Civ. No. 86-154 (D.D.C.). APWU is the plaintiff in another case in which the District Court entered summary judgment on the basis of the lower court's opinion that is now before this Court. *APWU v. United States*, Civ. No. 86-147 (D.D.C.).

ARGUMENT

Introduction and Summary

In *First National Bank v. United Airlines*, 342 U.S. 396, 398 (1952), Justice Jackson, with his customary elegance, explained why he had written a concurring opinion:

> I part company with the Court as to the road we will travel to reach a destination where all agree we will stop, at least for the night. But sometimes the path that we are beating out by our travel is more important to the future wayfarer than the place in which we choose to lodge.

This brief *amici curiae* is filed in the same spirit. We agree with the court below that the Balanced Budget and Emergency Deficit Control Act of 1985 (hereinafter "the Act") violates the Constitution by conferring significant responsibilities in carrying out that law on the Comptroller General, an officer whose removal from office Congress retains the exclusive power to initiate and whose removal Congress can accomplish over the President's objection.[2] However, we believe that the path fol-

[2] The Senate argues that the "restraint with which the Court approaches separation of powers controversies and the respect that the Court shows coordinate branches counsel against adjudicating the potential exercise of the removal provision in these appeals." Sen. Br. 25. We entirely agree that judicial restraint should be exercised with respect to separation of powers issues, because these are among the most sensitive and far-reaching of constitutional questions. For this reason, among others, we urge in our argument that the judgment of the court below should be affirmed only on narrow grounds.

We cannot, however, agree with the Senate's contention that this Court can and should refrain from passing on the constitutionality of the 1985 Act insofar as that Act vests powers to carry out the law in the Comptroller General. The Senate's argument, that the issue is not ripe until removal proceedings are instituted, is wrong. The constitutional issue herein is not whether an officer who has the responsibilities created by the 1985 Act may constitutionally be removed by joint resolution as provided in the 1921 Act, but whether an officer who *is* so removable may perform those responsi-

lowed by the Court below to that result would unnecessarily cast into doubt the constitutionality of valuable institutions in the administrative structure of the federal government.

The office of Comptroller General is—so far as our research, the decision below, and the presentations of the appellants show—unique among federal offices with respect to the power of removal. The Comptroller General is the only federal officer with the responsibility to carry out a duly enacted federal law as to whom Congress has retained the power actively to participate in the removal process—let alone the exclusive power to initiate removal from office.[3] The Comptroller General is also the only federal officer with such a responsibility

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bilities. The latter issue is, as the District Court correctly decided, ripe for decision now because if the removal provisions of the 1921 Act render the Comptroller General too dependent on Congress or insufficiently dependent on the President (or some combination of the two) the impact on his performance of his functions under the 1985 Act is immediate. It is the *potential* of removal by Congress and the *immunity* from removal by the President for cause or otherwise which give rise to the constitutional issues in this case. For the Court to wait until the Comptroller General is removed and then to decide whether his removal was constitutional is to risk that important decisions in carrying out federal laws will be made by an officer in whom such authority may not constitutionally be vested; the primary object of constitutional concern is the decision-making process, rather than protection of the Comptroller General.

The separate argument of the Comptroller General and the Senate —that, if the removal provision applicable to the Comptroller is constitutionally incompatible with his functions under the Act, then the removal provision should be severed from the earlier statute (CG Br. 33-48; Sen. Br. 31-43)—is similarly flawed. Rather than burden the Court with a full elaboration of the reasons for rejecting the severability argument, we rely on the arguments on this issue that are presented in the briefs of the appellees. We note here only that Congress expressly ruled out appellants' suggestion by legislating a "fallback" provision in the 1985 Act to take effect in the event that the Comptroller General's duties under that Act were held invalid, § 274(f).

[3] See pp. 28-29, *infra*.

as to whom the President is denied all power, on any grounds, to initiate removal from office.

These attributes of the office of Comptroller General raise two distinct issues in the context of the significant responsibilities conferred on the Comptroller by the Act. The first, and in our view the decisive, issue is whether the Constitution permits Congress to retain for itself the ability to control on an ongoing basis the actions of federal officers in carrying out duly enacted federal laws by making such officers responsible, here exclusively responsible, to Congress. The focus of this issue is the role of Congress: specifically, the extent to which, if at all, Congress may be actively involved in the administration, elaboration and execution of a federal law after that law has been enacted. As to this issue, as we show in part I, *infra*, the answer is clear: Congress may not delegate the task of carrying out a law Congress has passed to federal officers who are responsible exclusively to Congress.

The second issue has a very different focus. As already mentioned, apart from the role that Congress has reserved for itself in the removal process, Congress has denied the President the power to initiate removal of the Comptroller General. The second issue thus posed is the extent to which Congress, acting in its legislative capacity, may specify the standards and procedures that will govern the President in exercising the power to remove federal officers. This issue implicates a central dilemma of our modern federal administrative structure: the tension between Congress' authority to provide for certain federal agencies and officers that operate independently of direct political control and influence, on the one hand, and the constitutional requirement of a unitary Chief Executive who is politically accountable for the execution of the laws, on the other hand. This issue focuses on the role of the President: specifically, what does the Constitution mandate wtih regard to the rela-

tionship a President must have with a federal agency or officer. The Court has several times spoken to this second issue—most notably in *Myers v. United States*, 272 U.S. 52 (1926), and *Humphrey's Executor v. United States*, 295 U.S. 602 (1935)—without arriving at a conclusive answer.

The analysis of the court below confuses these two issues. And, as a result, that court dealt unnecessarily with the issue of the degree of control the Constitution grants the President over federal agencies and officers who have been delegated a role in carrying out federal law. As we show in part II, *infra*, this Court need not and should not reach this second issue. Over the years, Congress has concluded that certain functions of the federal government should be placed in the hands of agencies or officers that are insulated to some degree from political influence or control. Congress has adopted myriad means of providing such insulation, often in the form of limitations on the President's removal power with respect to the office in question. Because any pronouncement by this Court on this issue would, therefore, have significance far beyond the case at hand, and because this issue has thus far proved complex and difficult to resolve, it is particularly important that the Court not address this issue unless that is required. And, for the reasons already noted, the issue need not be addressed here: Whatever limitations may properly be put on the President's control over a federal agency or officer, Congress may not create "independent" agencies or officers by substituting congressional control for presidential control.

I. The Question Of Congress' Authority To Play An Active Role In The Removal Of Officers Of The United States.

A. There is much dispute in this case as to the proper labels to be affixed to the status of the Comptroller General and to his various functions. It is debated whether the Comptroller is an officer of the executive branch or of the legislative branch and whether his functions in the main are part of the legislative process or part of the process of carrying out duly enacted laws. In our view, these questions of characterization are largely beside the point. For what is critical here is not in dispute: the substance of the Comptroller General's responsibilities under the Act and the manner in which the Comptroller may be removed from office. Those concrete particulars rather than generalities or labels are the proper starting point in analyzing this case.

1. The Act sets a "maximum deficit amount" for each fiscal year over the five-year period ending in 1991, § 201(a)(1). In advance of each of these fiscal years the Director of the Office of Management and Budget (hereinafter "OMB") and the Director of the Congressional Budget Office (hereinafter "CBO") are required to prepare a report containing: (a) an estimate of the anticipated "budget base levels of total revenues and budget outlays" for the fiscal year; (b) a determination "whether the projected deficit for such fiscal year will exceed the maximum deficit amount for [that] year" by more than a specified amount; and (c) an estimate of the "rate of real economic growth that will occur during such fiscal year, the rate of real economic growth that will occur during each quarter of such fiscal year, and the rate of real economic growth that will have occurred during each of the last two quarters of the preceding fiscal year," §§ 251(a)(1), (2) & 251(c). If these estimates and determinations show that the deficit will exceed the limits set forth in the Act, the OMB and CBO

Directors are then, by applying the formula set forth in § 251(a)(3) of the Act, to specify the amounts and percentages by which each budget account is to be reduced. Upon completion, the report of the OMB and CBO Directors is to be submitted to the Comptroller General.

The Act instructs the Comptroller General to "review and consider" this report and with "due regard for the data, assumptions, and methodologies" to issue his own report to the President and Congress, §§ 251(b) & 251(c)(2). The Comptroller General's report is required to "contain estimates, determinations, and specifications for all the items contained in the report submitted by the Directors" of OMB and CBO, and specifically to "provide for the determination of reductions [in the various budget accounts] in the manner specified in subsection (a)(3)," §§ 251(b)(2) & 251(c)(2)(B).

The Act directs the President to implement the Comptroller General's determinations as to the reductions to be made in the various budget accounts through issuance of a presidential order, § 252. And the Act makes clear that the President is bound by the Comptroller General's determinations:

> ORDER TO BE BASED ON COMPTROLLER GENERAL'S REPORT.—The [Presidential] order must provide for reductions in the manner specified in section 251(a)(3), must incorporate the provisions of the [Comptroller General's] report submitted under section 251(b), and must be consistent with such report in all respects. The President may not modify or recalculate any of the estimates, determinations, specifications, bases, amounts, or percentages set forth in the report submitted under section 251(b) in determining the reductions to be specified in the order with respect to programs, projects, and activities, or with respect to budget activities, within an account, with the exception of the authority granted to the President for fiscal year 1986 with respect to defense programs pursuant to paragraph (2)(C). [§ 252(a)(3); see also § 252(b)(1)].

Thus, the Comptroller General's responsibilities under the Act are most substantial. In essence, the Comptroller General is to determine in each of five fiscal years the required level of budget reductions and the amount to be sequestered in each budget acocunt. These determinations can in no respect be understood as merely ministerial calculations. Although the Act sets forth guidelines and definitions that frame the inquiry, it remains true that projections of economic growth and estimates of budget revenues and outlays ultimately require the exercise of a large measure of judgment and discretion based on economic and budgetary expertise. And, upon a determination that reductions are called for, the further determination of the amounts to be reduced in the various budget accounts requires interpretation and application of a complex statutory formula. The determinations made by the Comptroller General in this manner are binding on the President. The Act requires the President to put these determinations into effect and denies the President power to alter what the Comptroller General has done.

The Comptroller General's role under the Act cannot be viewed as part of the legislative process; that process *ended with the passage of the Act.* Were the legislative process still under way the President would as a matter of constitutional prerogative retain a veto power over the Comptroller General's determinations. In short, the Comptroller's job under the Act is purely to carry out the objectives of a duly enacted law.

It is of course often possible to characterize such responsibilities as in the nature of a "legislative" or "judicial" task. Any authority delegated by Congress respecting determinations that make a general rule concrete in a particular instance and that Congress might have made itself could be termed in the nature of legislative authority, or because the delegatee is to determine what the general rule means could be termed in the

nature of judicial authority. But such characterizations have no meaning in the present context. This Court stated in *INS v. Chadha*, 462 U.S. 919, 953-954 n.16 (1983), that the implementation of law, no matter how characterized, is not a legislative function:

> Executive action under legislatively delegated authority that might resemble "legislative" action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of Executive action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely.

2. Congress chose the Comptroller General to carry out the responsibilities stated in §§ 251(b) & (c) of the Act precisely because Congress did not trust the President or the federal officers subject to the President's control to do so. The office of Comptroller General was created in 1921 to provide for a federal officer independent of the President and his administration who could audit the flow of federal moneys and perform other fiscal "watchdog" functions.[4] In order to insulate the Comptroller General from interference by the President or his administration, the 1921 Congress deemed it necessary to deny the President the power to initiate, on any grounds, removal of the person serving as the Comptroller. Indeed, Congress specifically rejected an amendment that would have provided the President a very lim-

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[4] Aside from the responsibilities given him by the 1985 Act, many of the Comptroller General's functions fall clearly within the category of duties in aid of the legislative process. See Joint Appendix ("JA") at 71-72 n.29. Other functions of that office may not be so clearly labeled. See, e.g., *Ameron, Inc. v. United States Army Corps of Engineers*, No. 85-5226, slip op. at 5 (3d Cir. March 27, 1986). The only functions of the Comptroller General at issue in this case are those arising under the Act presently under challenge.

ited power to remove the Comptroller General. That amendment proposed to provide for removal

> . . . by the President after notice and hearing when in his judgment the comptroller general . . . has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner . . . . [61 Cong. Rec. 1079, 1083].

The floor debate shows that Congress rejected even this limited presidential removal power because it is inconsistent with the degree of independence Congress believed is required of a Comptroller General. *Id.* at 1083-1084.

The 1921 Congress, however, did not stop at this point. Rather, Congress determined to confer upon itself the very power denied the President: the power to initiate removal from office of the person serving as Comptroller General. Indeed, Congress gave itself the power to initiate removal of the Comptroller General on the very grounds explicitly denied to the President as inconsistent with the independence of the office. Thus, Congress reserved for itself the power, by joint resolution, to effect removal of the Comptroller General on the following grounds: "permanent disability," "inefficiency," "neglect of duty," "malfeasance," or "a felony or conduct involving moral turpitude." 31 U.S.C. § 703(e)(1)(B)[5].

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[5] As the Brief for appellant Comptroller General (hereinafter "CG Br.") acknowledges, proponents of the various Comptroller General bills in 1919 and 1921 repeatedly referred to the Comptroller General as an "arm" or "agent" of Congress. CG Br. at 26-27. And, numerous subsequent statutes refer to the Comptroller General and the General Accounting Office as "part of" or "an agency of" the legislative branch. See the authorities cited in the lower court's opinion at JA 72 n.29. The Comptroller General's brief attempts to explain these references away as "merely conclusory synonyms for 'independence.'" CG Br. at 27. But this explanation simply reinforces the conclusion that Congress' concern for

B. Given the responsibilities delegated to the Comptroller General by the Act, and the means by which the Comptroller may be removed from office, the factors that frame the decisive question here may be stated as follows: The Act grants to the Comptroller General a significant responsibility in carrying out the law, including making determinations that are binding on the President as to whether and how much to cut the budget. No matter how the Comptroller General performs that responsibility, the President has no recourse; the President has no power to initiate removal of the Comptroller even if the President believes that the Comptroller is carrying out the responsibility in a manner that is biased or incompetent. The Congress, however, is *not so limited;* the Congress may initiate removal of the Comptroller General if the Congress is not satisfied with how the Comptroller carries out his responsibility under the Act. And, the Comptroller General will carry out that responsibility, when matters of discretion or judgment are at issue, knowing whom it is he must please—*viz.*, knowing that Congress is his true master.[6]

"independence" is defined in terms of independence from the President and does not include a concern that political influence emanating from Congress might affect the determinations of the Comptroller General.

In fact, the congressional debates described the Comptroller General's relationship to Congress in far more explicit terms than the Comptroller General's brief suggests. See, *e.g.*, 61 Cong. Rec. 1081 (1921) (Rep. Byrns) ("we felt that this man should be brought under the sole control of Congress, so that Congress at any moment when it was found he . . . was not carrying on the duties of his office . . . as the Congress expected, could remove him"); *id.* at 1084 (Rep. Fess) ("If there is anything that we want to do, it is to take this man from under the influence of the executive . . . and put him under the legislative . . ."); 58 Cong. Rec. 7278 (1919) (Rep. Byrns) (removal provisions "make[] him responsible to Congress and not to the President"); *id.* at 7280-81 (Rep. Temple) ("control should lie with the appropriating power"); *id.* at 7282 (Rep. Good).

[6] The point here is not merely that the Comptroller General will be moved by a fear of removal; the locus of the power to remove

The issue thus framed goes well beyond what standards the Congress may legislate to confine the President's power to remove an officer of the United States. Rather, the issue under discussion now involves the Congress' attempt to act in a different capacity. The power to initiate removal, other than by impeachment, of a federal officer charged with the responsibility of carrying out a duly enacted federal law, is, we submit, a non-legislative power in the critical sense relevant here—a power that *goes beyond* the powers conferred on Congress by Article I of the Constitution.

One of the Constitution's paramount aims is to grant the Congress only that portion of a parliament's powers that goes to enacting laws and at the same time to deny Congress direct control of the remainder of what it takes to make a law effective in practical terms, whether the latter is called law execution, administration or interpretation. Simply stated, Congress may not retain for itself the power to participate in or control the process of implementing the laws Congress enacts.

Article I of the Constitution vests "All legislative powers herein granted" in the Congress, and contains an enumeration of those legislative powers. Article II states that "The executive power shall be vested in a President of the United States," and places upon the President the responsibility to "take care that the laws be faithfully executed." The Constitution, moreover, expressly creates certain exceptions to those general grants of authority. Thus, for example, Article I, § 7 carves out for the President a role in the legislative process: the power to approve or veto legislation. And, Congress is expressly given the right to participate in specified executive func-

determines where one who is subject to removal looks for guidance as to what is good performance and what is not as well as to what will enhance and what will limit his long term acceptability. The Comptroller General is in all these senses Congress' servant. See *supra*, note 5.

tions: For example, Article II, § 2 provides that the making of treaties and the appointment of certain officers of the United States shall be the responsibility of the President "by and with the advice and consent of the Senate"; and Article I specifies the respective roles for the houses of Congress in the impeachment process. Art. I, § 2, cl. 5 & § 3, cl. 6.[7]

While the Constitution expressly confers upon the Senate an active role in the appointment process, no such role is given in the removal process—except in impeachment proceedings . And, it is inconsistent with the constitutional scheme as just described to permit such a role. *Cf. INS v. Chadha, supra*, 462 U.S. at 955-956. This point is at the core of the congressional debate, discussed at legnth in the various opinions in *Myers v. United States*, 272 U.S. 52 (1926), over what has become known as "the Decision of 1789." Thus, the opinion in *Myers* states:

> It is very clear from this history that the exact question which the House voted upon was whether it should recognize and declare the *power of the President under the Constitution to remove* the Secretary of Foreign Affairs *without the advice and consent of the Senate.* That was what the vote was taken for. [272 U.S. at 114 (emphasis added)].[8]

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[7] Of course, by the passage of laws pursuant to the enumerated powers in Article I, Congress directs and confines the substance and the manner of executive action. But Congress' role in shaping executive action through the legislative process must be distinguished from Congress actually playing a part in the process of carrying out duly enacted laws. For elaboration of this point, see Part II *infra.*

[8] See also *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 259 (1839), where this Court described the issue debated in the Decision of 1789 as follows:

> This power of removal from office was a subject much disputed, and upon which a great diversity of opinion was entertained in the early history of this government. This related . . . to the power of the President to remove officers appointed with the concurrence of the Senate: and the great question was whether

And, statements throughout the debate focused on whether Congress had the power directly to participate in a decision to remove an officer of the United States. The following statements by James Madison are illustrative:

> Vest this power in the Senate jointly with the President, and you abolish at once that great principle of unity and responsibility in the Executive Department, which was intended for the security of liberty and the public good. [1 Annals of Cong. 499, quoted in *Myers*, 272 U.S. at 131; see also, 272 U.S. at 131 (statement of Mr. Boudinot)].
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> * * *
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> Perhaps there was no argument urged with more success or more plausibly grounded against the Constitution under which we are now deliberating than that founded on the mingling of the Executive and Legislative branches of the government in one body. It has been objected that the Senate have too much of the Executive power even, by having control over the President in the appointment to office. Now shall we extend this connection between the Legislative and Executive departments which will strengthen the objection and diminish the responsibility we have in the head of the Executive? [1 Annals of Cong. 380, quoted in *Myers*, 272 U.S. at 120-121].
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> * * *
>
> The powers relative to offices are partly Legislative and partly Executive. The Legislature creates the office, defines the powers, limits its duration and annexes a compensation. This done, the Legislative power ceases. They ought to have nothing to do with designating the man to fill the office. That I conceive

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> the removal was to be by the President alone, or, with the concurrence of the Senate, both constituting the appointing power.

The Court went on to state that "it was very early adopted as the practical construction of the Constitution that this power was vested in the President alone." *Ibid.*

> to be of an Executive nature. Although it be qualified in the Constitution, I would not extend or strain that qualification beyond the limits precisely fixed for it. We ought always to consider the Constitution with an eye to the principles upon which it was founded. [1 Annals of Cong. 581, quoted in *Myers*, 272 U.S. at 128-129].

Myers itself likewise involved a congressional assertion of the power to participate in the actual decision to remove an officer. The statute at issue in *Myers* provided for removal of certain classes of postmasters "by the President *by and with the advice and consent of the Senate*." 272 U.S. at 107. That statute did not purport to establish substantive standards that would govern the removal process, and so the question of the extent to which Congress, acting within its legislative role, may limit the President's power of removal was not presented in that case. There are, to be sure, broad dicta in *Myers* that do touch on this latter point. These dicta proved controversial and were later limited in *Humphrey's Executor*—a matter we discuss *infra* at 26. But the actual ruling of *Myers*—that Congress may not directly participate in the removal process through the advice and consent procedure—has never been questioned by later decisions.

The point here is not one of mere technicality but goes to the heart of the constitutional scheme. Although the legislative and executive branches were each expressly granted certain carefully confined roles to play within the other's general area of authority, it was a central concern of the Framers that neither the legislative branch nor the executive branch aggrandize its own powers at the expense of the other. See The Federalist Nos. 47 & 48, at 325-327, 332-335 (J. Cooke ed. 1961) (Madison). Thus, Madison quoted Montesquieu's famous maxim that "When the legislative and executive powers are united in the same person or body . . . there can be no liberty. . . ."

Id. at 326. And, Madison translated that maxim, in the context of our constitutional structure, into the proposition that "neither of [the branches] ought to possess directly or indirectly, an overruling influence over the others in the administration of their respective powers." *Id.* at 332.

Given the parameters of our constitutional structure, this proposition must be understood as referring not to the control that each branch has, acting within its delineated sphere specified in the Constitution, over the exercise of powers by the other branches. Obviously, the President can veto an act of Congress; this Court can strike down a piece of legislation or invalidate an executive action; and, Congress can establish, through legislation, both the substantive enactments the President is to execute and the institutions of government through which he is to execute those enactments. Rather, the Framers' objective was to prohibit one branch from arrogating to itself the power to undertake the *actual performance* of the functions allocated to another branch. For such an accumulation of power would nullify the checks and balances that are the cornerstone of our form of limited government.

Such an accumulation of power exists in the present case in a more dramatic form than was addressed in either the Decision of 1789 or *Myers*. Here, Congress has not merely asserted the power to participate in the removal decision by requiring that the President obtain the advice and consent of the Senate. Here, Congress has reserved to itself the exclusive power to initiate—and complete—the Comptroller General's removal. Here, then, Congress has in a real sense asserted the power to implement a duly enacted law: Congress has conferred the responsibility to carry out that law upon an officer answerable only to Congress. When Congress delegates to its own agent the power to implement a law, Congress

does precisely what the Framers most fervently sought to prevent.[9]

Though the instances have been few, this Court has always been quick to set aside comparable efforts by one branch to seize for itself the powers of another branch. Thus, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-588 (1952), when the shoe was on the other foot, this Court stated:

> In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make the laws which the President is to execute. The first section of the first article says that "All legislative Powers herein granted shall be vested in a Congress of the United States. . . ."

And, in *Buckley v. Valeo*, 424 U.S. 1 (1975), and *INS v. Chadha, supra,* this Court rejected congressional asser-

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[9] Another aspect of the Act, not directly at issue in this litigation, illustrates how dramatically Congress has offended this elementary principle of separation. Section 251(d)(3) provides a mechanism by which the President can shift monies about, within the defense budget, while honoring the overall constraints the new law enacts; he is empowered to terminate or modify existing contracts and credit the monies thus freed to projects whose funding would otherwise be reduced. The President must, however, report his decisions implementing this authority, in a specified format, to the Comptroller General. The President's decisions may take effect *only* if the Comptroller General certifies to him and to Congress that stated judgmental criteria are met. The constitutional offense is clear: The Comptroller General, who is subject to removal only by Congress, is authorized to overrule the executive judgment of the Prseident himself as to how the laws shall be faithfully executed. U.S. Const., Art. II, § 3. *Cf. Chicago & Southern Air Lines v. Waterman Corp.*, 333 U.S. 103 (1948).

tions of the power to participate directly in the implementation of laws.

In *Buckley*, Congress created a commission, to which were delegated wide-ranging rulemaking and enforcement powers, and then provided that a majority of the commission would be appointed by officers of Congress. As here, Congress was seeking direct control over the officers who were charged with implementing the law. This Court struck down that arrangement as violative of the Appointments Clause in Article 2, § 2 of the Constitution, which provides that the President "shall nominate, and by and with the advice and consent of the Senate, shall appoint" federal officials of the rank of the commissioners in *Buckley*. While relying on that specific constitutional provision, the Court made clear that the Appointments Clause is part of an overall constitutional framework which prohibits each of the three branches of the federal government from taking over the work of the other branches. Thus, the *Buckley* Court stated:

> Our inquiry of necessity touches upon the fundamental principles of the Government established by the Framers of the Constitution, and all litigants and all of the courts which have addressed themselves to the matter start on common ground in the recognition of the intent of the Framers that the powers of the three great branches of the National Government be largely separate from one another. [424 U.S. at 120].

And, in that context, the Court expressed the central constitutional concern which governs the instant case as well as *Buckley*:

> [T]he debates of the Constitutional Convention, and the Federalist Papers, are replete with expressions of fear that the Legislative Branch of the National Government will aggrandize itself at the expense of the other two branches. [424 U.S. at 129 (footnote omitted)].

In *Chada*, Congress had by statute delegated to the Attorney General, upon certain findings of fact, the discretion to decide whether to suspend deportation of an alien. However, Congress attached a string to that delegation. The statute that made the delegation provided that either house of Congress could, within certain time limits, pass a resolution nullifying any particular decision of the Attorney General to suspend deportation. This Court struck down that scheme on the ground that the so-called "one-house veto" was an exercise of the legislative power that did not conform to the express constitutional requirements that all legislation must be passed by both houses of Congress and presented to the President before becoming law.

Congress' failure in *Chadha* to conform to the requirements of the legislative process expressly stated in Article I suggests an illuminating perspective on this case: Congress in *Chadha* having delegated the responsibility to carry out the law, attempted to retain the ability to control the execution of the law in individual cases. This attempt by Congress makes *Chadha* akin to the situation here:

> Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a congressional veto. [*Chadha*, 462 U.S. at 954 n.16].

Just as Congress may not "control administration of the laws" in the fashion challenged in *Chadha*, Congress may not "control administration of the laws" by delegating the responsibility for such administration to an officer who is Congress' agent, as Congress attempted both in *Buckley* and in this case.

One commentator has succinctly stated the principles that we believe should inform the proper resolution of this case:

> The issue of aggrandizement seems inevitable, however, where Congress asserts the right itself to control the removal question. It has not only limited the President's ordinary political authority by imposing a "for cause" requirement, but also greatly expanded its own political authority by insisting on a voice in that determination. The latter measure defeats any claim that the measure has an apolitical end such as assuring objectivity.
>
> * * *
>
> At least within a certain range, . . . Congress readily can exclude the President from political control of regulatory outcomes. Yet the rationale for these measures, and for the apparent offense they give to the President's claim to serve as the unitary head of executive government, equally requires that Congress exclude itself from such controls. A measure that enhances Congress's political controls while isolating the President would threaten both his position as unitary head of government, and his continuing capacity to function as a political counterweight to Congress. [Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573, 614, 638 (1984) (footnote omitted).]

Under these principles the Act now before the Court must be held unconstitutional.

II. The Question Of Congress' Authority To Enact Laws That Set Standards Or Procedures Governing The Removal Of Officers Of The United States.

The court below rested its holding on the theory we have just developed (JA 78):

> We hold . . . that since the powers conferred by the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress, those powers cannot be exercised . . . .

As we stated at the outset, our difference with that court thus lies not with its holding, but in the path taken to reach that result. The court below mixed into its analysis a lengthy discussion of a second, distinct issue: the extent to which Congress may establish by *statute* standards and procedures that limit the President's ability to remove officers of the United States. See JA 65-76.

In part I we showed that this further issue *need not* be reached. In this part of our argument, we show that this Court *should not* reach this issue.

A. The question of what limits the Congress may by statute place on the President's removal power is not answered in terms by the Constitution, or by any of the contemporaneous materials that sometimes throw light on the intention of the Framers.

Article I, to begin with, does provide a heavy counter on Congress' side. Unlike the power actively to participate in the decision to remove individual officers of the United States, the authority to legislate standards and procedures governing the removal process *is* within the terms of the legislative power vested in Congress by Article I of the Constitution. Art. I, § 8, cl. 18, grants to Congress the power:

> To make all laws which shall be necessary and proper for carrying into *execution* the foregoing powers, *and all other powers vested by this Constitution in the government* of the United States, *or in any department or officer thereof.* [Emphasis added].

Certainly an enactment specifying the standards and procedures for removing a federal officer entrusted with carrying out federal law is a "proper" law for "carrying into execution . . . powers vested by this Constitution in the government of the United States or in any department or officer thereof"; these words affirmatively cover, rather than exclude, laws directed to the Executive Branch.

The question as to the nature and extent of Congress' power to legislate respecting standards for removal thus

reduces to whether Article I's grant of authority is somehow limited by an overriding grant of authority to the President. Nothing in the Constitution expressly states such a grant of authority to the President. Except for the impeachment provisions, the Constitution does not in terms so much as notice the question of removal of federal officers from their positions. While, as we discussed in part I, the power to remove is part of "the executive power," that fact does not negate Congress' authority to set standards governing the exercise of the removal power. As just stated, both Article I and the scheme of the Constitution make it plain that to a great extent "the executive power" will be defined and limited by statutes enacted by Congress. Strauss, 84 Colum. L. Rev. at 601.

The laws that the President is to "take care [to] . . . faithfully execute[]" are for the most part laws adopted by Congress. By and large statutes enacted by Congress define the substantive standards the President has the obligation to implement and often prescribe the procedures the executive is to follow in performing that duty. Thus, the President's role in executing the laws is primarily dedicated to carrying out the will of Congress as expressed in statutory laws.

These general propositions are undoubtedly applicable to the President's power to appoint officers of the United States. While the power to appoint is expressly granted to the President in Art. II, § 2, cl. 2—albeit subject to the advice and consent of the Senate—the Constitution is silent as to whether Congress may prescribe by statute standards governing appointments. But there is no doubt that Congress has that power. It is Congress which creates the offices—not the Constitution—and it has been unquestioned from the outset that Congress may establish by statute the qualifications for appointment to the various offices the President has the authority to fill, the terms of such offices, the salaries of such offices, and other conditions and incidents of the appointment process.

See, *e.g.*, pp. 14-15, *supra*; see also, *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Monaghan, *Marbury and the Administrative State*, 83 Colum. 1 (1983).

By a parity of reasoning, it would seem to follow that Congress should have a similar power respecting the removal process—*viz.*, the power to prescribe by statute the conditions for removal. Article I states as much, albeit in general terms, and nothing in the terms of the Constitution, or in the authoritative constitutional materials, expressly indicates otherwise.

But the inquiry does not end at this point. For there are additional considerations which suggest that Congress' power to prescribe standards for removal may be subject to an outer limit. The constitutional structure of government is characterized by tension between competing principals rather than by unlimited grants of authority. The Federalist No. 51, at 349 (J. Cooke ed. 1961) (Madison). Here, Congress' undoubted and broad authority under the necessary and proper clause is held in check by the fundamental judgment in Article II that "the executive power" is to be vested in a *single* executive. A principal reason for a unitary executive is the need for political accountability. The Framers rejected the notion of multiple executives in significant part because the fragmentation of executive power would make it too difficult to hold anyone politically accountable for the exercise of the executive power. See The Federalist No. 70, at 476-48 (Hamilton); see also, Strauss, *supra*, 84 Colum. L. Rev. at 599-601.

Accordingly, standards and procedures that Congress may enact as limitations on the President's removal power must not go so far as to be inconsistent with the concept of a unitary executive adopted by the Constitution. To illustrate by an extreme example, if the President were denied *all* power of removal—as well as all other means of control—of an officer or agency charged

with implementing the law, there would *in effect* be a fragmentation of the executive power, with a resultant absence of political accountability. In the words of Professor Strauss:

> The unitary responsibility thus expressed, and sharply intended, does not admit relationships in which the President is permitted so little capacity to engage in oversight that the public could no longer rationally believe in that responsibility. The charge to "take care [that the laws be faithfully executed]" implies that congressional structuring must in some sense admit of his doing so. An effort, then, to establish an agency over which the President's control went no further than the power to appoint its heads should be found deficient. [84 Colum. L. Rev. at 648-649; *see also id.* at 640-643.]

The limitations on Congress' power may well depend on the nature of the office. The President's removal authority would appear to be subject to the least limitation with respect to cabinet officers and other close political advisors.

B. The discussion thus far suggests that the Constitution safeguards a minimum relationship that the President must have with the agencies or officers to whom Congress delegates authority to carry out the laws.[10] This Court's decisions to date have not defined that relationship. *Myers* and *Humphrey's Executor* are most often cited in this connection, but neither of these cases can be

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[10] In this brief we address only officers of the United States who, like the Comptroller General, are appointed by the President with the advice and consent of the Senate. The Constitution also provides, in the "excepting clause" to Article II, § 2, that "the Congress may by law vest the appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." It has long been recognized that when Congress acts pursuant to this provision and "vests the appointment of inferior officers in the heads of departments, it may limit and restrict the removal as it deems best for the public interest." *United States v. Perkins*, 116 U.S. 483, 485 (1886); *accord, Myers*, 272 U.S. at 160-61.

considered to have satisfactorily, much less conclusively, done so.

As discussed earlier, *supra* at 15, the issue of the extent to which Congress may prescribe by statute standards that govern removal was not presented for decision in *Myers*. The statute at issue in *Myers* did not purport to set any standards governing removal. Rather, that statute provided for Congress' *participation* in the actual removal decision in individual cases by means of the advice and consent procedure—raising an issue which, as we have shown at length, is distinct from the one now under discussion. And, as we have also shown, the materials on which the *Myers* Court based its decision, most notably the debates in connection with the Decision of 1789, were similarly addressed to the question whether Congress has the power to participate by means of advice and consent in individual removal decisions. See pp. 13-15, *supra*. Thus, the statements in *Myers* suggesting that Congress may not establish standards limiting the President's removal powers are dicta, and indeed dicta unsupported by the constitutional materials cited therein. Again, Professor Strauss has captured the point:

> *Myers* can readily be limited to the issue presented by the provision for senatorial concurrence in removal, the Tenure of Office Act problem. Although the *Myers* Court talked at times as if it regarded the use of fixed terms of office and "for cause" requirements to restrict the President's removal authority as equally difficult, that equation is not convincing. Reservation of senatorial approval for removals suggests political power struggles between President and Senate that are not connoted by a judgment that fixed tenure in office, with limitations on discharge, will be useful for the ends of public policy. [84 Colum. L. Rev. at 614 (footnote omitted).]

Humphrey's Executor establishes (as did *Marbury v. Madison, supra*) that functionally related removal restrictions need not threaten "the equilibrium [between

President and Congress] established by our constitutional system." *Youngstown, supra,* 343 U.S. at 638 (Jackson, J., concurring). At the same time, the reasoning of *Humphrey's Executor* is less than satisfactory. That decision limits the dicta in *Myers*—that the President has an illimitable power of removal—"to include [only] all purely executive officers." 295 U.S. at 627-628. And, the opinion then defines commissioners of the Federal Trade Commission out of that category by characterizing their functions as "quasi-legislative or quasi-judicial powers" and by characterizing the FTC "as an agency of the legislative or judicial department of the government." *Id.* at 628.

Such characterizations obscure rather than illuminate analysis. At least part of the responsibility of the FTC commissioners in *Humphrey's Executor* was to carry out laws duly enacted by Congress. That part of their responsibility, no matter how it may be labeled, cannot, consistent with the separation of powers, be under the ongoing control of Congress. See part I, *supra.* Thus, unless that work is to be performed wholly outside the political structure of our government, these commissioners must have some continuing accountability to the President. Cf. *Chevron USA, Inc. v. Natural Resources Defense Council,* —— U.S. ——, 52 L.W. 4845, 4853 (1984).

The opinion in *Buckley* reflects a recognition that notwithstanding the labels, functions of the type performed by the commissioners in *Humphrey's Executor* must be considered to be within the general domain of the Executive Branch:

> All aspects of the [Federal Election Campaign] Act are brought within the [Federal Election] Commission's broad administrative powers: rulemaking, advisory opinions, and determinations of eligibility for funds and even for federal elective office itself. These functions, exercised free from day-to-day supervision of either Congress or the Executive

> Branch, are more legislative and judicial in nature than are the Commission's enforcement powers, and are of kinds usually performed by independent regulatory agencies or by some department in the Executive Branch under the direction of an Act of Congress. Congress viewed these broad powers as essential to effective and impartial administration of the entire substantive framework of the Act. Yet each of these functions also represents the performance of a significant governmental duty exercised pursuant to a public law. While the President may not insist that such functions be delegated to an appointee of his removable at will, *Humphrey's Executor v. United States*, 295 U.S. 602 (1935), none of them operates merely in aid of congressional authority to legislate or is sufficiently removed from the administration and enforcement of public law to allow it to be performed by the present Commission. These administrative functions may therefore be exercised only by persons who are "Officers of the United States." [424 U.S. at 140-141, footnotes omitted.]

The point for now is that the issue of the nature and extent of Congress' authority by statute to limit the President's removal power is one of genuine difficulty, and one that this Court has yet to resolve in any definitive way.

C. The issue is not only difficult and unresolved, it is one of profound significance. It has become a tenet of our modern government that certain administrative decisions should be made by agencies or officers who are insulated, at least to some degree, from political influences. The decision to establish such decision-makers has rested on precisely the kind of policy judgments that the Constitution grants Congress the authority to make. Thus, Congress has decided that there are numerous categories of determinations made by the federal government that are better made by disinterested law enforcement officials than by those subject to the potentially corrupting influences of immediate political pressures. See, *e.g.*, *Humphrey's Executor* and *Weiner v. United States*, 357

U.S. 349 (1958). There is legitimate room for debate over whether these congressional decisions are wise or unwise, but there is no basis for the argument that Congress' efforts in this regard to promote the disinterested and principled execution of the laws are necessarily threats to the structure of our system of government.

In large part, the mechanism that Congress has chosen to accomplish political insulation of this kind has been the enactment of statutory limitations on the President's removal power. The statute books contain a variety of formulations for such limitations, as Congress has grappled with the problem over time and in the context of a wide range of agency functions.

Thus, for example, the members of the Federal Reserve Board are appointed for fourteen-year terms "unless sooner removed for cause by the President." 12 U.S.C. § 242. Members of the FTC serve seven-year terms and may be removed by the President "for inefficiency, neglect of duty, or malfeasance in office." 15 U.S.C. § 41. The removal provision respecting members of the National Labor Relations Board, whose normal term is five years, establishes both substantive and procedural restrictions on the removal powers: "Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." 29 U.S.C. § 153(a). Members of the Federal Communications Commission, the Securities and Exchange Commission, and the Federal Election Commission are appointed for terms of seven, five and six years respectively, with no express provisions for removal. 47 U.S.C. § 154; 15 U.S.C. § 78d; and 2 U.S.C. § 437c. *See Weiner, supra.*

With respect to a number of offices, the President is required upon removing the officer to communicate the reasons for removal to Congress. Thus, the President's power to remove the Director of Operational Test and Evaluation in the Department of Defense is not limited by any express language, but the President is required

to "communicate the reasons for any such removal to both Houses of Congress." 10 U.S.C. § 136a. A similar provision obtains for the Inspectors General in the Department of Energy, 42 U.S.C. § 7138, the State Department, 22 U.S.C. § 3929, and the Department of Health and Human Services, 42 U.S.C. § 3522. With respect to the Inspector General in the Synthetic Fuels Corporation, Congress has provided both a substantive limitation—he may be removed by the President only for neglect of duty or malfeasance in office—and the requirement that the President communicate the reasons for removal to Congress. 42 U.S.C. § 8718.

These examples manifest a serious effort by Congress in a variety of contexts to address the inherent tension between the need for decision-makers who are insulated from immediate political influence and the need for a politically accountable Chief Executive. And it is the political branches, working through the legislative process, that the Framers intended would be responsible for working out solutions to these sorts of structural dilemmas. The Constitution provides directly for the three institutions at the apex of the federal government —the Congress, the President, and the Supreme Court, and

> [t]he remainder of government was left undefined, in the expectation that congressional judgments about appropriate structure would serve so long as they observed the two prescriptive judgments embodied in the Constitution: that the work of law-administration be under the supervision of a unitary, politically accountable chief executive; and that the structures chosen permit, even encourage, the continuation of rivalries and tensions among the three named heads of government, in order that no one body become irreversibly dominant and thus threaten to deprive the people themselves of their voice and control.
>
> [This] judgment leaves Congress free in particular cases to choose among a variety of relationships

> the President might have with those who actually do the work of law-administration . . . . [Strauss, *supra*, 84 Colum. L. Rev. at 667.]

The question of Congress' power to legislate with regard to the removal of federal officers is thus at the furthest remove from the separation of powers questions considered in *Buckley* and in *Chadha*. Both of those cases concerned *express constitutional limitations* on the legislative power. Similarly, the point discussed in part I of this brief involves the exercise by Congress of a power not granted to the legislative branch. Here, in contrast, the Constitution and original materials leave no doubt that the political branches are accorded a broad area of freedom within which to reach any of a multitude of practical arrangements in working out the structure of the government and to vary those arrangements from time to time based on experience. This Court should be slow to limit that freedom through a set of rules drawn out of the Constitution by the delicate—and hazardous—process of implication. *Chevron*, *supra*, 52 L.W. at 5853. Against this background there can be no doubt that the Court should not reach out for occasions to set the metes and bounds of the legislative power to regulate the removal process.

CONCLUSION

For the foregoing reasons, the decision of the District Court should be affirmed.

Respectfully submitted,

ROBERT M. WEINBERG
PETER O. SHINEVAR
1000 Connecticut Ave., N.W.
Washington, D.C. 20036

LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
Attorneys for Amici Curiae

Of Counsel:
GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

EDWARD J. HICKEY, JR.
THOMAS A. WOODLEY
1125 15th Street, N.W.
Washington, D.C. 20005
Counsel for Public Employee Department, AFL-CIO

MARK ROTH
80 F Street, N.W.
Washington, D.C. 20001
Counsel for American Federation of Government Employees, AFL-CIO

DARRYL J. ANDERSON
ANTON G. HAJJAR
1400 Eye Street, N.W.
Washington, D.C. 20005
Counsel for American Postal Workers Union, AFL-CIO

BRUCE H. SIMON
330 West 42nd Street
New York, NY 10036
Counsel for National Association of Letter Carriers, AFL-CIO

Nos. 85-1377, 85-1378, 85-1379

IN THE
Supreme Court of the United States
OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant
v.
MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees

UNITED STATES SENATE,
Appellant
v.
MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellants
v.
MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees

On Appeals from the United States District Court for the District of Columbia

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

H. STEPHAN GORDON
General Counsel
PATRICK J. RILEY *
Deputy General Counsel
SUZANNE L. KALFUS
BRUCE P. HEPPEN
Assistant Counsel
NATIONAL FEDERATION OF FEDERAL EMPLOYEES
1016 16th Street, N.W.
Washington, D.C. 20036
(202) 862-4400

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Did the court below correctly hold that the Balanced Budget and Emergency Deficit Control Act of 1985 violates separation of powers principles in assigning a significant executive role to the Comptroller General, an official who is removable by and otherwise answerable only to Congress?

II. Did the district court err in concluding that the automatic spending reduction mechanism in the Act was not an unconstitutional delegation of legislative power where the Act charges unelected officials with the unprecedented power to undo duly enacted appropriations law, and is designed to thwart congressional accountability by allowing the federal budget deficit to be cut without legislative approval or the possibility of an executive veto.

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BRIEF FOR THE NATIONAL FEDERATION OF FEDERAL EMPLOYEES AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES

INTEREST OF THE *AMICUS*

Amicus is a labor union which represents federal employees in nearly every goverment agency. *Amicus* and its members, who include retired federal employees, have a vital interest in this case, which presents constitutional issues concerning separation of powers and the delegation of appropriations power to administrative officials. That vital interest derives primarily from the adverse impact that the Balanced Budget and Emergency Deficit Control Act of 1985, is having and will continue to have on 1) the continued employment and other working conditions of the members of *amicus*; 2) the COLAs due its retiree/members; as well as 3) the quality and efficiency of the services provided by the Federal Labor Relations Authority and Merit Systems Protection Board, which were explicitly created by Congress to set policy and generally administer the various facets of the federal labor program.

Amicus urges this Court to uphold the district court decision with respect to the separation of powers issue and to reconsider and reverse the court's analysis of the issue pertaining to delegation of legislative power.

STATEMENT OF THE CASE

The Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. 99-177, 99 Stat. 1037, was signed by the President on December 12, 1985, and became immediately applicable to the current fiscal year, 1986.

On December 12, 1985, Representative Mike Synar filed an action against the United States challenging the Act's constitutionality. The United States Senate and the Comptroller General intervened as defendants.

On December 31, 1985, the National Treasury Employees Union (NTEU) filed a similar action which was con-

solidated with Synar's by Order dated January 2, 1986. Thereafter, the Speaker and Bipartisan Leadership Group of the United States House of Representatives intervened as a defendant in the consolidated cases.

The three judge District Court, *see* Act, § 274(a)(5), issued its decision on February 7, 1986, declaring that the President's February 1st sequestration order was "without legal force and effect." After finding that the plaintiffs had standing, the District Court ruled that the automatic spending reduction mechanism violated the separation of powers doctrine. However, the Court rejected plaintiff's arguments that the enormous and unguided authority the Act delegates to the Office of Management and Budget, the Congressional Budget Office and the Comptroller General to alter existing legislation violates the constitutional provision that vests all legislative powers in Congress.

The District Court thus invalidated the Act based on the unconstitutional role of the Comptroller General. The Court, however, stayed implementation of its judgment, pending appeals to this Court.

SUMMARY OF ARGUMENT

1. Under the 1985 Gramm-Rudman Act, Congress assigned the Comptroller General the responsibility of determining the amount of annual budget reductions to eliminate the federal deficit. The Comptroller General's determinations are final and binding and cannot be altered or overridden even by the President. These new duties involve "executing the laws"—a function constitutionally reserved to the President and officers under his control. Under the separation of powers doctrine, these duties cannot be performed by the Comptroller General since he is not subject to control by the President. Rather, Congress exercises control over him by virtue of a highly unusual provision in the 1921 Budget Act which gives Congress the power to remove him upon a finding of "cause."

This case should be decided on the narrow grounds that the assignment of executive functions to an office under congressional control is unconstitutional. We urge this Court to steer clear of the many unnecessary constitutional questions urged upon it. This Court need not and should not address the degree of control Congress may exercise over an officer performing nonexecutive functions. Nor should the Court address whether or to what extent Congress may otherwise limit the President's control over officers performing executive functions. By resolving the instant question on these narrow grounds the Court can thus avoid wreaking havoc on the aggregate of "independent agencies" in the so-called fourth branch of government.

2. Inherent in the Constitution is a restriction on Congress' ability to transfer its power to other entities, known as the delegation doctrine. *Amicus* urges that a reinvigorated standard for judging delegations of power should be applied in this case, including inquiry as to whether a particular power can be delegated at all. While Congress may rely upon expert advice to determine what the anticipated budgetary deficit may be and to make economic forecasts, the decision to enact a budget and appropriate specific sums of money is a uniquely legislative function protected by U.S. Const. art. I, § 8, cl. 1 and art. I, § 9, cl. 7. Congress may not delegate it to another entity, as Congress must be accountable to the people of the United States for such decisions.

This decision is also contrary to the result reached in *INS v. Chadha*, as there this Court reaffirmed that Congress can only exercise its lawmaking functions through the bicameral passage of bills. Here the lawmaking function has been delegated. This delegation further violates *Chadha*, as it precludes exercise of the President's veto power under the presentment clause.

ARGUMENT

I. THIS COURT SHOULD UPHOLD THE LOWER COURT'S FINDING OF UNCONSTITUTIONALITY BASED ON THE NARROW GROUND THAT CONGRESS' ASSIGNMENT OF EXECUTIVE DUTIES TO AN OFFICIAL WHOM IT MAY REMOVE, VIOLATES THE SEPARATION OF POWERS DOCTRINE.

This case involves a violation of the constitutional separation of powers doctrine resulting from the recent congressional assignment of executive functions to an officer under the control of Congress. This control is exercised through direct congressional power to remove him pursuant to a highly unusual statutory provision.[1] Under the Balanced Budget and Emergency Deficit Control Act of 1985 (hereafter Gramm-Rudman Act), Congress established a procedure to eliminate the federal budget deficit over a five year period through the mandatory sequestration of funds, with the key budget reduction decisions to be made by the Comptroller General of the United

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[1] The Budget and Accounting Act of 1921, codified at 31 U.S.C. §§ 701, *et seq.*, provides at § 703(e)(1) (1982):

> A Comptroller General or Deputy Comptroller General retires on becoming 70 years of age. Either may be removed at any time by
>
> (A) impeachment; or
>
> (B) joint resolution of Congress, after notice and an opportunity for a hearing, only for—
>
> (i) permanent disability;
> (ii) inefficiency;
> (iii) neglect of duty;
> (iv) malfeasance; or
> (v) a felony or conduct involving moral turpitude.

"To provide for the removal of an officer by joint resolution of Congress is confessedly something of a novelty in our legislative history. . . ." Corwin, *Tenure of Office and the Removal Power Under the Constitution*, 27 Colum. L. Rev. 353, 396 (1927).

States.[2] The duties assigned to the Comptroller General under Gramm-Rudman are extremely significant because they entrust him with responsibilities that rise to the level of "executing the laws,"—duties traditionally performed by executive officers.[3]

Although the Comptroller General is appointed by the President with the advice and consent of the Senate,[4] he is definitely not an executive officer or under control of the executive branch. The Comptroller General is an office in the General Accounting Office which was created by the Budget and Accounting Act of 1921 (hereafter 1921 Budget Act).[5] For more than sixty years, the Comptroller General has served as the independent auditor of the federal government's finances, performing legislative and adjudicatory duties at the direction of Congress.[6] Furthermore, the Comptroller General has been, and continues to be, under the control of Congress by virtue of its ability to remove him by joint resolution.[7]

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[2] Pub. L. No. 99-177, 99 Stat. 1037. The Gramm-Rudman Act provides for annual reductions in the budget deficit in order to attain a zero deficit by fiscal year 1991 by establishing annual maximum deficit levels for each fiscal year. After reviewing a mandated report of the Office of Management and Budget and the Congressional Budget Office, the Comptroller General is empowered to determine the requisite budget reductions based on his independent judgment as to the anticipated fiscal year's deficit, expected economic conditions, and the budget base of accounts and programs. The Comptroller General then issues his own report setting forth the amount of reductions to be made in each non-defense account and in each defense program, project, and activity. Section 252 of the Act *requires* the President to implement, through a sequestration order, the reductions specified by the Comptroller General.

[3] *See* Gramm-Rudman Act, § 251(b); § 252(a)(3).

[4] 31 U.S.C. § 703(a)(1) (1982).

[5] 42 Stat. 20 (codified at 31 U.S.C. §§ 701, *et seq.*).

[6] *See infra* p. 15, 16 n.49.

[7] 31 U.S.C. § 703(e)(1) (1982); *see* n.1, *supra*.

The Gramm-Rudman Act's assignment of new, executive duties to an officer under the control of the legislative branch creates a constitutional problem. The Constitution divides the power of government among three branches, giving Congress the power to legislate, the President the power to execute the laws, and the courts the power to adjudicate.[8] This separation of powers between three distinct branches of government was carefully structured by the framers as an essential means of preserving a democratic system of government and guarding against tyranny through the undue accumulation of power in any one branch.[9] The doctrine functions today to limit the exercise of governmental authority to its constitutionally prescribed branch[10] or to at least ensure that its exercise remains under the control of that branch.[11]

The Constitution vests the power to appoint officers of the United States in the President.[12] The framers believed that the ability to appoint officers was a necessary part of the power to execute the laws and thus intrinsic to the Presidential function.[13] It is the ability to exercise control over those acting on one's behalf that the framers deemed vital and which lies at the heart of their decision to give the President, rather than the legislature,[14] power over both the assignment *and removal* of officers executing the laws.[15] It is this same issue of insufficient control

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[8] U.S. CONST. art. I, § 1; art. II, § 1; art. III, § 1.

[9] *The Federalist No. 48*, at 327 (J. Madison) (P. Ford ed. 1898).

[10] *See INS v. Chadha*, 462 U.S. 919, 951 (1983).

[11] *See United States v. Nixon*, 418 U.S. 683, 707 (1974); *Nixon v. Administrator of General Services*, 433 U.S. 425, 441-443 (1977); Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 Colum. L. Rev. 573 (1984).

[12] U.S. CONST., Art. II, § 2, cl. 2.

[13] *Myers v. United States*, 272 U.S. 52, 117 (1926).

[14] 272 U.S. at 127-129.

[15] 272 U.S. at 119, *citing* Roger Sherman, 1 Annals of Congress, 491.

over an officer executing the laws that makes the legislation at issue here unconstitutional.

A. The statutory assignment of executive functions to an officer not under the control of the President should be declared unconstitutional consistent with other statutes where Congress attempted to arrogate improper constitutional authority to itself.

The language and spirit of the Constitution set forth a delicately structured balance which carefully prescribes and limits the roles of Congress and the other branches. Congress' permissible involvement, both in the removal of executive officers and in the exercise of other powers, is clearly circumscribed. Where Congress has attempted to assign itself a greater role than authorized under the Constitution, this Court has rightfully struck down such laws.

In only four cases has this Court dealt with questions regarding the extent to which Congress may play a role in the President's removal of officers of the United States appointed by him.[16] A review of these cases reveals the importance of this Presidential power and the carefully limited role permitted Congress under the Constitution.

First, in *Shurtleff v. United States*,[17] the Court refused to impose any restriction on the President's power to remove at will a Customs Department official in the absence of "very clear and explicit language" evidencing such intent.[18] In the landmark case of *Myers v. United States*,[19]

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16 The Constitution also authorizes Congress to "vest the Appointment of such inferior officers, as they think proper, in the President alone, in the Courts of law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. *See In re Hennen*, 38 U.S. (13 Pet.) 230 (1839) and *United States v. Perkins*, 116 U.S. 483 (1886) where this Court evaluated the removal power over officers not appointed by the President.

17 189 U.S. 311 (1903).

18 *Id.* at 315.

19 272 U.S. 52 (1926).

the Court found unconstitutional a statute conditioning the President's right to remove a postmaster upon the consent of the Senate. In that case, the Court found Congress' attempt to play a direct role in the removal process to be constitutionally infirm. *Myers* sharply contrasted such congressional participation with the practice affirmed in *Perkins*, which allowed Congress to prescribe incidental regulations to restrict the method by which a Department Head could remove an official he had appointed.[20]

> But the Court never has held, nor reasonably could hold . . . that the excepting clauses enables Congress to draw to itself . . . the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.[21]

Humphrey's Executor v. United States[22] upheld the constitutionality of the Federal Trade Commission Act's removal provision, which provided that the President could only remove Federal Trade Commissioners for "cause."[23]

The Court was cognizant of the distinction between the congressional enactment of a legislative standard and congressional participation in the executive power of removal. This essential distinction was explained in the argument for the Executor.

> The sole question determined in the *Myers* case was that Congress could not compel the President to *share* with the Senate his power to remove executive officers. The power of removal is exclusively an executive function and Congress of course has no au-

[20] 272 U.S. at 161.

[21] *Id.*

[22] 295 U.S. 602 (1935).

[23] *Id.* at 620.

> thority to appropriate to itself a power given exclusively to the President.
>
> This fundamental distinction between the *Myers* case and the enactment of a legislative standard which the President must follow in the exercise of his exclusive power of removal was expressly recognized by counsel for the United States in the argument in the *Myers* case (emphasis in original).[24]

Thus, the Court upheld the validity of this legislative standard for removal, but only as applied to officers exercising quasi-legislative or quasi-judicial powers.[25] At the same time, the Court reaffirmed the President's illimitable power of removal over purely executive officers, as in *Myers*.[26]

Finally, in *Wiener v. United States*,[27] despite statutory silence, the Court inferred from the legislative history congressional intent to place a "cause" limitation on the President's power to remove the "quasi-judicial" commissioners of the War Claims Commission.[28]

There is a clear distinction between the statute found unconstitutional in *Myers* and those upheld in the other removal cases. As was recognized both in *Myers* and in *Humphrey's Executor*, Congress exceeds its permissible role when it inserts itself in the actual removal process of executive officers. Such congressional involvement goes far beyond the role of legislating standards for the other branches to implement. Two subsequent cases in which this Court struck down statutes violating the sepa-

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[24] *Id.* at 609-610.

[25] *Id.* at 628. The Court described a Federal Trade Commissioner as "an officer who occupies no place in the executive department and who exercises no part ofthe executive power vested by the Constitution in the President." *Id.*

[26] *Id.* at 627-628.

[27] 357 U.S. 349 (1958).

[28] *Id.* at 354-355.

ration of powers doctrine illustrate the limitations on direct congressional action outside the legislative process.

In *Buckley v. Valeo*,[29] the Court addressed a series of challenges to the Federal Election Act and the "independent" Federal Election Commission created by that Act. The Court upheld a separation of powers challenge to a provision for direct legislative appointment of some members of the Commission.[30] Under that Act, the Commission was composed of six voting members, none of whom were appointed by the constitutionally prescribed procedure for appointing "officers of the United States." [31] Two of the Commissioners were appointed by the President, two appointed by the President *pro tempore* of the Senate, and two appointed by the Speaker of the House of Representatives, with *all* six subject to confirmation by a majority of *both* Houses of Congress.[32]

To determine whether the Commissioners should have been appointed by the means specified by the Constitution, the Court examined the functions of the Commission.[33] The Court found that the Commission was authorized to conduct investigations, engage in rulemaking, and adjudicate and enforce the law.[34] The Court focused on rulemaking as "the performance of a significant governmental duty exercised pursuant to a public law" which could be performed only by "officers of the United States," persons appointed pursuant to the constitutionally mandated procedure.[35] The Court found that Congress had exceeded its constitutionally limited role in the appointment process and struck down the statute.

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[29] 424 U.S. 1 (1976).

[30] *Id.* at 140.

[31] *Id.* at 113 (1976). *See also* U.S. CONST. art. II, § 2.

[32] 424 U.S. at 113.

[33] *Id.* at 109-113, 137-143.

[34] *Id.*

[35] *Id.* at 141.

It is noteworthy that Congress attempted to expand its role in the constitutional appointment process in two ways. First, it vested in itself the power to directly appoint four commissioners. Second, it sought to add to its authority by conditioning all of the appointments on the consent of both Houses of Congress.[36] Both of these efforts involved an attempt by Congress to draw to itself additional power over appointments by increasing its direct participation in the appointment process of the head of an agency exercising other than purely legislative authority.

Such congressional attempts to increase its *direct role* in the appointment process are completely distinct from congressional efforts to "limit" the appointment power of the President by legislating standards or requirements applicable to those he appoints. This was aptly noted in *Humphrey's Executor*:

> The enactment of a legislative standard to be met by appointees of the President has always been regarded both by the courts and the President as a legislative and not an executive function. No Court has ever held that the enactment of such a legislative standard to be followed by the President in making nominations is an invalid limitation upon the appointing power of the Executive. And this in spite of the fact that the power of appointment is expressly vested in the President.[37]

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[36] The impermissible usurpation of power is specifically addressed by Justice White in his separate opinion. *See Id.* at 268-269. (White, J., concurring). This congressional attempt to draw authority to itself is comparable to its attempt in *Myers* to condition the President's right to remove on the approval of the Senate. *See supra* p. 7-8. Both are improper attempts to distort the "institutional structure" engineered by the Constitution by adding a confirmatory step in the legislature. *See* Burkoff, *Appointment and Removal Under the Federal Constitution: The Impact of Buckley v. Valeo*, 22 Wayne L. Rev. 1335, 1366 (1976).

[37] 295 U.S. at 609 (Argument for the Executor).

Congress' role in legislating standards to govern either the appointment or removal of officers of the United States is far different from a direct attempt of Congress to participate in the appointment or removal act itself. It was Congress' attempt to *insert itself* into the appointment process, beyond the congressional role, that formed the basis of the Court's decision in *Buckley*.

The *Buckley* Court evaluated this statutory scheme in light of the Constitution's fundamental purpose without having to "place" the agency in one of the three branches of government and without regard for its purportedly "independent" status.[38] Even so, the statute was found to be unconstitutional due to the excessive authority assumed by Congress over the control of the appointments process.[39]

In *INS v. Chadha*,[40] the Court struck down a one-house legislative veto provision as another congressional attempt to give to itself participatory authority beyond that authorized by the Constitution. In *Chadha*, the Court evaluated the Immigration and Nationality Act, under which Congress had conditionally delegated to the Executive Branch, specifically the Attorney General, the authority to determine whether deportable aliens met specified criteria which would allow them to remain in this country.[41] The authority delegated to the Executive was conditioned by Congress' retained "veto" of the Attorney General's decision; exercised through the adoption of a resolution of one House.[42]

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[38] *See* Strauss, *supra* n.11, at 617-19. Likewise, appellants' attempt to characterize the GAO as an "independent agency in the executive branch" has no legal or constitutional significance. *See infra* p. 20, n.64.

[39] *See infra* n.52.

[40] 462 U.S. 919 (1983).

[41] *Id.* at 954.

[42] *Id.* at 952.

The Court concluded that the only means by which Congress can act to implement policy decisions is through the legislative process specified in the Constitution which mandates bicameral passage followed by presentment to the President.[43] Thus, just as Congress' original delegation of authority to the Attorney General had to be accomplished through the legislative process, so too would any revocation of the delegation or any substantive determination by Congress on a deportation suspension.[44] Since the one-house veto provision would have empowered Congress to legislate without adhering to the prescribed bicameral process accompanied by presentment to the President, it was struck down as unconstitutional.[45]

The role sought by Congress under the Immigration Act is comparable to its similar attempts in *Buckley, Myers* and the case-at-hand. There was no doubt under *Chadha* that Congress could prescribe the standards under which aliens could be deported and delegate the application of those standards to the Attorney General, so long as it accomplished both means through the legislative process mandated by the Constitution. Congress could not, however, assign to one House the power to legislate, or retain control over the executive's exercise of properly delegated authority, outside of the prescribed legislative process. The attempt by Congress to expand its own power through the legislative veto directly intrudes into the functioning of another branch and violates the separation of powers doctrine.

This Court need not address the extent to which a basic constitutional function may be exercised by one of the other branches. Rather, the separation of powers principle is violated when a governmental power is placed

[43] *Id.* at 953-55. Nor does the veto fall within any of the four express exceptions giving one House authority to act alone. *Id.*, at 955-57.

[44] *Id.* at 954-55.

[45] *Id.* at 956-59.

beyond the control of the correlate branch. Thus, the problem here is not whether or to what extent the Comptroller General, as a so-called "independent officer," can exercise executive functions. Rather, the constitutional infirmity lies with Congress assigning executive duties to an officer over whom it exercises control.

This case, like *Myers*, *Buckley* and *Chadha*, demonstrates the congressional aggrandizement of power by restricting the proper exercise of authority of another branch. This attempt constitutes a violation of the separation of power doctrine.[46] As such, this Court should strike down the Gramm-Rudman provision as an unconstitutional assignment of executive duties to an officer over whom Congress exercises control.[47]

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[46] As this Court aptly noted in *Chadha*, despite the practicality or efficiency of a particular procedure, it cannot be upheld if its operation violates the Constitution.

> The choices we discern as having been made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable . . . There is no support in the Constitution or decisions of this Court for the proposition that the cumbersomeness and delays often encountered in complying with explicit constitutional standards may be avoided, either by the Congress or by the President. (citation omitted).

Id. at 959. Likewise, the *Buckley* Court found the appointment provision of the Federal Election Commission Act to be unconstitutional, despite the fact that the practical effect of retaining the appointment authority in the President may have resulted in a Commission more sympathetic to the office it was created to oversee. *See supra* p. 10-12.

[47] If this Court finds that the duties assigned to the Comptroller General under the Gramm-Rudman Act are unconstitutional it can remedy the defect in three ways: it can sever the Gramm-Rudman provision assigning the Comptroller General executive duties and let the Act's fallback provision take effect; it can sever the entire removal provision of the 1921 Act; or it can excise the language giving Congress a role in the removal process but leave the cause standard under the 1921 Act. Appellants urge this Court to remedy any constitutional defects by striking the removal provision from the 1921 Budget Act. This is clearly contrary to congressional intent as

B. This Court need not and should not now resolve whether Congress may have a direct role in removing officers of the United States performing nonexecutive functions.

Appellant Comptroller General urges the Court to initiate an evaluation of the 1921 Budget Act and to assess the constitutional compatibility of its provisions assigning duties to the Comptroller General with the provision governing his removal.[48] *Amicus* contends that it is unnecessary and unwise for the Court to do so at this juncture.

The duties assigned to the Comptroller General under the 1921 Budget Act are clearly nonexecutive.[49] Thus,

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well as to the most fundamental principles of statutory construction. "The cardinal principle of statutory construction is to save and not to destroy." *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). Striking the removal provision from the 1921 Budget Act contradicts this rule and would have grave and widespread ramifications. It would affect the Comptroller General in the performance of all his duties and disturb a statutory scheme which has functioned well for over sixty years. Such action is antithetical to the purposes for which GAO was created and the functions the Comptroller General performs under the Budget Act.

Furthermore, severing the 1921 Budget Act will also require the Court to address a constitutional question it can otherwise avoid: whether or to what extent Congress may limit the President's removal power by legislating "cause" standards. *See infra* p. 18-21. The constitutional defect posed by the Gramm-Rudman Act should be remedied in the least disruptive manner: striking the offending section of the Gramm-Rudman Act and allowing the fall-back procedure to remain in effect.

[48] Brief for Appellant Comptroller General of the United States at 15-18.

[49] The 1921 Act assigned to GAO the functions of auditing and settling accounts which had been previously performed by the Comptroller of the Treasury. 42 Stat. at 24-25. The District Court reviewed these duties and correctly identified them as legislative. Decision at 43, n.29 Joint Appendix (hereafter J.A.) at 71-72. The Court also noted the frequent characterization of the Comp-

the control that Congress exercises over him, by virtue of its power to remove him,[50] does not pose the same constitutional problem of legislative control over an executive officer discussed above.

Whether Congress may assign to itself, the right to remove or participate in the removal of officers of the United States exercising non-executive functions is an unresolved issue. The decisions of this Court do not address this question.[51]

Nor is there universal agreement on this question by legal scholars. Some authorities have concluded that it is within the power of Congress to endow itself with the power to remove the Comptroller General due to the legislative nature and functions of the Office.[52] However, it has been strongly argued that the power to remove even officers appointed under Article II of the Constitu-

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troller General and the GAO as "part of" or "an agency of" the legislative branch. *Id.*

Other knowledgeable legal scholars have similarly found that "[the] functions of the office are quasi-legislative. "The Comptroller General acts as the agent of Congress . . . . Congress has created an office whose functions are in no way executive . . ." Donovan and Irvine, *The President's Power to Remove Members of Administrative Agencies*, 21 Cornell L. Q. 215, 238-240 (1936). The office is also identified as legislative in light of its characteristic functions and historical derivation. "It is not a judicial office, it is not an executive office. It is an organ of the legislature; or to speak more exactly, it is an organ of the national revenue power which is vested by the Constitution in Congress." Corwin, *supra* n.1, at 396.

[50] It is undisputed that Congress sought to establish the Office of Comptroller General free from executive control due to the perceived need for an auditor independent of the executive, and in pursuit of this goal inserted its highly unusual removal clause. 31 U.S.C. § 702(a) and § 703(e)(1) (1982).

[51] *See supra* p. 7-9.

[52] Corwin, *supra* n.1 at 397; *see also* Donovan and Irvine, *supra*, n.49 at 240.

tion, lies exclusively with the President.[53] Likewise, a strict reading of the Constitution could suggest that the failure to prescribe congressional participation in the removal of officers excludes the legislature from this role.[54] This Court, like the District Court, need not and should not attempt to resolve this issue in this case.[55]

The controversy presented here results from the new duties assigned to Comptroller General under the 1985 Gramm-Rudman Act rather than any harm or injury from the 1921 Budget Act standing alone. As a result of this, the Court is not being presented with full arguments on both sides, by interested parties, to enable it to make a thorough analysis of the constitutionality of Congress' power to remove an officer performing non-executive duties.

In essence, the Court is being asked by the appellants to adjudicate the constitutionality of a statute without a true case or controversy surrounding its operation.[56] The GAO and the Comptroller General have performed their duties under the 1921 Budget Act and its amendments for over sixty years without challenge. For this reason, the Court should avoid deciding an unnecessary constitutional question.[57]

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[53] President Wilson vetoed an early form of the 1921 Budget Act believing its removal provision unconstitutional. 59 Cong. Rec. 8609-10 (1920). *See also* Brief for Appellant Comptroller General of the United States at 47-48 on the *per se* unconstitutionality of the 1921 removal provision.

[54] *See Chadha, supra* n.40.

[55] The District Court considered, but did not decide, this issue. The Court found it "at least questionable whether the power [of removal by Congress] would be approved even with respect to officers of the United States who exercise only "quasi-legislative" powers in the *Humphrey's Executor* sense[.]" Decision at 46, J.A. at 75.

[56] The prohibition against advisory opinions is premised on the requirement that the Court resolve issues only where a true case or controversy is presented. *Muskrat v. United States*, 219 U.S. 346 (1911).

[57] In *Rescue Army v. Municipal Court*, 331 U.S. 549 (1947) the Court stated ". . . constitutional issues affecting legislation will

C. This Court need not and should not now decide whether or to what extent Congress may prescribe a standard which the President must apply in exercising his right to remove officers exercising executive functions.

The controversy in this case results from Congress' assignment of executive functions to the Comptroller General despite Congress' power to remove him for cause. As such, it is the assignment of executive duties to the Comptroller General which should be found unconstitutional because of the provision giving Congress a direct role in his removal.[58] By deciding the case on this narrow ground, the Court can limit the applicability of its holding to the specific and highly unusual facts in this case and avoid opening a "Pandora's box" of problems regarding independent officers or agencies. We are not confronted with a statute imposing a "cause" requirement on the President's power to remove officers performing executive duties. We urge this Court not to address the question of the constitutionality of such standards, for both prudential and practical considerations.

Clearly, it is not necessary for the Court to resolve this issue since the "cause standard" for removal under the 1921 Budget Act is not applied exclusively by the President. As such, the Court is not confronted with a concrete controversy regarding the power of Congress to limit the President's power to remove executive officers solely "for cause." The Court should follow its own policy of judicial restraint and avoid passing upon the constitutionality of this question.[59]

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not be determined . . . in advance of the necessity of deciding them . . ." *Id.* at 568-69.

[58] We know of no other non-legislative agency whose officers Congress can directly remove. Thus, a finding of unconstitutionality based only on the unusual removal provision will have no effect on other "independent" agencies.

[59] *See Rescue Army v. Municipal Court, supra* n.57 (judicial policy of avoiding constitutional questions).

Further, the constitutionality of Congress imposing restrictions on the President's power to remove officers who exercise some (but not exclusively) executive functions, has not been addressed by this Court nor thrashed out in the lower courts. As the District Court noted, this issue falls squarely in the "no-man's land" which *Humphrey's Executor* specifically declined to resolve.[60]

At this time, few lower court decisions have addressed this issue as the lower courts are only now beginning to confront it.[61] This is further justification for this Court to avoid addressing the extent to which Congress may regulate or restrict the President's power to remove officers performing executive functions until it has had the opportunity to receive opinions and analyses from the courts below. Such deference is a proper exercise of judicial restraint and will enable the Court to be better informed when confronting the issue.

The past few decades have seen the emergence of a myriad of administrative agencies empowered to perform all types of governmental functions. These administrative bodies, often called the "fourth branch" of government, have created a host of officials performing judicial, legislative and executive duties, yet falling outside the constitutional tripartite system of three named branches.[62] Issues such as how the constitutional separation-of-powers doctrine should be applied to agencies in the "fourth branch" and the extent and manner of

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[60] Decision at 42, J.A. at 71 *citing Humphrey's Executor* at 632.

[61] *See, e.g., Ticor Title Insurance Company v. Federal Trade Commission,* No. 85-8089 (D.D.C. Jan. 2, 1986) (Memorandum Opinion) (claim that Federal Trade Commissioners cannot constitutionally exercise "executive" law enforcement powers unless subject to President's supervisory control found unripe).

[62] "[Administrative bodies] have become a veritable Fourth branch of Government, which has deranged our three-branch legal theories. . . ." *FTC v. Ruberoid Co.,* 343 U.S. 470, 487 (1982) (Jackson, J., dissenting).

executive and congressional control over such agency officials, are unresolved by both the courts and the commentators.[63]

Appellants seek to characterize the GAO, and the Comptroller General, as "independent of both the President and Congress," thereby suggesting that such administrative "independence" justifies less executive oversight and permits greater control by Congress.[64] First, it is questioned by legal scholars how an administrative body may be created, that is sustainable under the Constitution, which purports to be beyond the control of the constitutionally defined branches of government.[65] Second, the notion that "independent" agencies function differently from "executive" agencies and hence deserve treatment under the Constitution, has been seriously questioned and largely discredited.[66] Finally, this Court's own rejection of congressional claims to special control over independent agencies, e.g., by invalidating legislative vetoes of independent agency action,[67] bears out the fallibility of Appellant's assertion.

As noted earlier, it is not necessary for this Court to characterize the GAO or the Comptroller General as

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[63] Strauss, *supra* n.11; Note, *Incorporation of Independent Agencies into the Executive Branch*, 94 Yale L. J. 1766 (1985); Burkoff, *supra* n.36, at 1372.

[64] *See* Brief for Appellant Comptroller General of the United States at 9, 18-27; Brief of Appellant United States Senate at 10, 14-20.

[65] Strauss, *supra* n.11 at 612. Likewise, it is questioned how an agency can exist under the Constitution, which purports to operate in *two* branches of the government. *Id.*

[66] *See* Strauss, *supra* n.11; Note, *supra* n.63.

[67] Note, *supra*, n.63 at 1779, 1780 *citing Process Gas Consumers Group v. Consumer Energy Council*, 103 S.Ct. 3556 (1983), *aff'g Consumer Energy Council v. FERC*, 673 F.2d 425 (D.C. Cir. 1982); *United States Senate v. FTC*, 103 S.Ct. 3556 (1983), *aff'g Consumer Union v. FTC*, 691 F.2d 575 (D.C. Cir. 1982) (en banc).

within a particular branch of government, in order to assess whether the functions assigned to them comport with the requisite constitutional checks and balances.[68] Nor, does the designation assigned to a particular agency necessarily resolve the constitutional restraints imposed on its officials.[69] We urge this Court to steer clear of the many unanswered constitutional questions posed by the development of the "fourth branch." The constitutionality of legislative standards limiting the President's power to remove officers in "independent" agencies, but performing executive functions, is not before the Court today. A vast number of "independent" agencies operating today, have been created by legislation which imposes such restrictions on the President's ability to remove their officers.[70] The Court need not now disturb this regulatory framework and should avoid doing so by waiting to answer these constitutional issues until properly presented in the future.

II. CONGRESS MAY NOT CONSTITUTIONALLY DELEGATE ITS POWER TO ENACT A BUDGET.

As an alternative to the limited approach urged above, *amicus* suggests that the Court disinter the remains of the delegation doctrine and resurrect it by creating new standards for its use. The delegation doctrine describes

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[68] *See supra* p. 13-14.

[69] It has been observed that "[a]n attempt to distinguish, in respect of the President's removal power, between various administrative agencies would logically require distinctions also between the same agency at different times." *Humphrey's Executor*, 295 U.S. at 618 (Argument for the United States).

[70] *E.g.*, Federal Labor Relations Authority, 5 U.S.C. § 7104(b); Federal Trade Commission, 15 U.S.C. § 41; Consumer Products Safety Commission, 15 U.S.C. § 2503(a); National Labor Relations Board, 29 U.S.C. § 153(a); Interstate Commerce Commission, 49 U.S.C. § 10301(c); National Transportation Safety Board, 49 U.S.C. § 1902(b); Nuclear Regulatory Commission, 42 U.S.C. § 5841(e); Occupational Safety and Health Commission, 29 U.S.C. § 661(b).

the limitation on Congress which prevents it from transferring all of its legislative power to other entities. It has long been recognized as constitutionally based, although its precise origin is unclear.[71] The doctrine suggests two areas of inquiry: first, whether the power being delegated is one which must be regulated entirely by Congress; and second, whether an adequate general standard has been announced, which gives the implementing entity specific guidance in exercising the delegated power.[72]

Commentators suggest that the doctrine be given new new utility.[73] The doctrine could serve the critical functions of ensuring legislative accountability and constitutional supremacy.[74] This case presents a unique opportunity to reaffirm the doctrine and to decide that the power to determine a budget for the United States is one which cannot be delegated.

A. Application of a renewed delegation doctrine warrants reversal of the District Court.

A decision to reinvigorate the delegation doctrine is particularly timely in light of the Court's decision in *INS v. Chadha.*[75] Creation of a new standard to review delegations would foster the goal of accountability which

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[71] Friedman, *Delegation of Power and Institutional Competence,* 43 U.Chi.L.Rev. 307, 310 (1976).

[72] *See Wayman v. Southard,* 23 U.S. (Wheat 10) 1 (1825). *See also Amalgamated Meat Cutters v. Connolly,* 337 F. Supp. 737, 745-746 (D.D.C. 1971), "The question is the extent to which the Constitution limits a legislature that may think it proper and needful to give the agency broad flexibility to cope with the conditions it encounters."

[73] *See, e.g.,* J. Ely, Democracy and Distrust, A Theory of Judicial Review, 131-34 (1980); T. Lowi., The End of Liberalism (1969) at 129-46, 297-99; Wright, Book Review, *Beyond Discretionary Justice,* 81 Yale L.J. 575, 582-87 (1972) (reviewing K. Davis, *Discretionary Justice: A Preliminary Inquiry* (1969).

[74] *See infra* p. 25.

[75] 462 U.S. 919 (1983).

Congress sought to achieve by means of the legislative veto, and would do so by constitutional norms.

Despite the fact that the doctrine has not been relied upon as a basis for striking down legislation since the 1930's,[76] the doctrine has been invoked on numerous occasions in the post-World War II era by members of this court in majority decisions as well as in concurrences and dissents.[77] It has been invoked in divergent cases such as *National Cable Television Association v. United States*,[78] and *Bob Jones University v. United States*,[79] which are important in determining whether and to what extent Congress may delegate its taxing power. In *National Cable*, the Court avoided the delegation issue by narrowly construing the statute as applying only to user fees, not taxes.[80] In *Bob Jones*, while the majority upheld the delegation of power to the Internal Revenue Service,[81] Justice Powell, concurring, noted that while IRS could not be delegated the power to make the policy decision, Congress had subsequently made the same decision.[82]

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[76] *See A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495 (1935), and *Panama Refining Company v. Ryan*, 293 U.S. 388 (1935).

[77] *United States v. Robel*, 389 U.S. 258, 272-73 (1967) (Brennan, J., concurring); *Arizona v. California*, 373 U.S. 546, 626 (1963) (Harlan, J., with Stewart, J., and Douglas, J., dissenting in part); *Kent v. Dulles*, 357 U.S. 116, 127-128 (1958).

[78] 415 U.S. 336 (1974).

[79] 461 U.S. 574 (1983).

[80] 415 U.S. at 340-341.

[81] 461 U.S. at 596. One commentator, in analyzing the Court's holding, was critical of the Court's failure to address the question of whether the IRS could, in fact, legitimately be vested with the authority conferred. Casenote, *Democracy and Delegation of Legislative Authority: Bob Jones University v. U.S.*, 26 B.C.L. Rev. 745 (1985), text at n.285.

[82] 461 U.S. at 611-612. *See also, IUD v. American Petroleum Institute*, 448 U.S. 607, 672 (1980) (Rehnquist, J. concurring) and *American Textile Manufacturers Institute, Inc. v. Donovan*, 452

NFFE urges that the Court consider two principles in devising a new standard for analyzing improper delegation: the need to assure accountability and the idea of constitutional supremacy. These principles warrrant adoption of somewhat different tests as described below.

Professor Schoenbrod writes that "legislators are classically understood to be held accountable by standing for reelection based upon their votes on legislation. The approach to delegation developed in *Yakus*, and *Amalgamated Meat Cutters* . . . clashes with this notion of accountability because the legislature could let the delegate choose, in the first instance, how to balance the conflicting goals." [83]

Professor Schoenbrod would analyze most Congressional enactments according to whether they embody rules or goals and he would abjure the use of the latter, as they "state goals, which usually conflict, and delegate the job of reconciling any such conflicts to others who are entrusted with promulgating the rules of conduct necessary to achieve those goals." [84] He notes that "a goal statute can be relatively specific in that a goal may be quite precise *e.g.*, raise so much revenue, reduce power plant emissions by so many tons." [85] He argues that such a statute is constitutionally flawed because the decision on how to accomplish the goal is left to the delegate.

Applying this analysis to the Gramm-Rudman Act leads to a conclusion that it is an unconstitutional delegation of power. However detailed the iteration of its

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U.S. 490, 547 (1981) (Rehnquist, J. and Burger, C.J., dissenting) ("Congress simply abdicated its responsibility").

[83] Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223 (1985) (hereafter Schoenbrod), at n.117-119; *accord, Casenote, supra* n.81, text at n.94-97; Comment, *Reviving the Delegation Doctrine,* 1984 B.Y.U.L. Rev. 619, text at n.129-130, and n.129.

[84] *Schoenbrod, supra,* n.83, at 1253.

[85] *Id.* at 1255.

goal of reducing the budget, the hard choice of making policy judgments has been avoided by Congress. The so-called fallback provision is constitutional because, while it requires OMB and CBO to provide Congress with detailed information about the economy, the final decision is made by the Congress.

The principle of constitutional supremacy, as described by Professor Friedman,[86] is that the Constitution is not just one means to an end but is a binding arrangement of offices and powers.[87] If Congress abdicates its role, it defeats the critical expectation that the supreme law, the constitution, will not be changed.[88] Thus, Congress may not transfer to others the task of deciding between salient policy alternatives because *it* is uniquely suited to make such decisions.

Decisions of this Court lend support for this set of principles. For example, in *J.W. Hampton Jr. and Co. v. United States*, the Court stated, "[I]t is a breach of the national fundamental law if Congress gives up its legislative power and transfers it to the President."[89] More recently, in *Chadha*, this Court noted, "There is unmistakable expression of a determination that legislation by the national Congress be a step-by-step, deliberate and deliberative process."[90]

The notions of constitutional supremacy and institutional competence apply equally to other branches of the government. The President may not delegate the power to pardon as he is uniquely competent to perform this task.[91] Similarly, the President's power under the presentment clause, to veto legislation, may not be withdrawn

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[86] Friedman, *supra* n.71 at 307, 311-317.

[87] *Id.* at 312.

[88] *Id.* at 312, 315.

[89] 276 U.S. at 394, 406.

[90] 462 U.S. at 959. *See supra* p. 14 n.46.

[91] Friedman, *supra* n.71 at 329-331.

from him.[92] Similarly, Congress' power to impeach may not be delegated.[93] Nor may its power to tax.[94]

Similarly, the theory of constitutional supremacy and of institutional competence requires that Congress not delegate its power to appropriate funds by means of enacting a budget. The Court below analogized Congress' power in this area to the power to tax.[95] However, this comparison is not entirely accurate, as the Constitution explicitly provides, "No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . ." [96] Thus, the reservation of budget making powers to Congress is stronger than that of the power to tax, as Congress is affirmatively granted the power to pay the Debts by art. I, § 8, as well as being restricted by art. I, § 9.

B. The budget making authority delegated to the Comptroller General constitutes an improper delegation under *Chadha*.

This Court's landmark decision in *Chadha* has important implications in considering Congress' decision to delegate its constitutional power to appropriate funds and determine the budget to the Comptroller General. In the instant case, there is an improper delegation of the lawmaking power committed to both Congress and the President.[97] Funds are being spent according to judgments made by the Comptroller General rather than according to the specifications of an appropriations bill.

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[92] 462 U.S. at 947-948.

[93] Friedman, *supra* n.71 at 327.

[94] *Id.* at 325.

[95] Decision at 18, J.A. at 43-44.

[96] U.S. Const. art. I, § 9, cl. 7.

[97] 462 U.S. at 946-948.

Moreover, the President has been denied his constitutional power of vetoing such a bill upon presentment.[98]

A critical issue in reviewing the constitutionality of a particular delegation is whether the power in question is one which can be delegated.[99] In *Chadha* the Court held:

> Amendment and repeal of statutes, no less than enactment, must conform with Article I. . . . Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way: bicameral passage followed by presentment to the President.[100]

Reduction of the federal deficit is a legislative, non-delegable decision. The legislative character of the Comptroller General's actions are confirmed by consideration of the congressional actions he is supplanting—the passage of appropriation bills. The sequestration order has the effect of permanently cancelling amounts which would otherwise have been appropriated.[101] Thus, a uniquely legislative function, the determination of policy through the process of determining the budget of the United States has been delegated by Congress to the Comptroller General.

Finally, Congress has in effect delegated the President's power to veto legislation to the Comptroller General, as the President is required under Gramm-Rudman to adopt the final sequestration order.[102] In *Chadha*, the Court emphasized the importance of the presentment clause

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[98] U.S. Const. art. 1, § 7, cl. 2.

[99] See *supra* p. 22.

[100] 462 U.S. at 952-955.

[101] Gramm-Rudman Act, § 252(a)(4).

[102] *Id.* § 252(b)(1).

in guaranteeing the President a role in the lawmaking process. He was granted a limited and qualified power to nullify proposed legislation, subject to an override by Congress.[103] By granting the Comptroller General the final power in regard to reducing the debt, the President's essential power in the lawmaking process has been unconstitutionally delegated away from him.

CONCLUSION

The District Court decision finding the assignment of executive powers to the Comptroller General unconstitutional should be affirmed.

In the alternative, the District Court decision upholding Congress' right to delegate the power to enact a budget should be reversed as a violation of the delegation doctrine.

Should any constitutional defect be found, it should be remedied in the least disruptive manner, by striking the offending section of the Gramm-Rudman Act and implementing the fall back procedure.

Respectfully submitted,

H. STEPHAN GORDON
General Counsel

PATRICK J. RILEY *
Deputy General Counsel

SUZANNE L. KALFUS
BRUCE P. HEPPEN
Assistant Counsel

NATIONAL FEDERATION OF
FEDERAL EMPLOYEES
1016 16th Street, N.W.
Washington, D.C. 20036
(202) 862-4400

* Counsel of Record

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[103] 462 U.S. at 946-948.

(19) (18) (19)

Nos. 85-1377, 85-1378 and 85-1379

IN THE

Supreme Court of the United States

October Term, 1985

CHARLES A. BOWSHER, Comptroller General of the United States,

Appellant,

v.

MIKE SYNAR, Member of Congress, et al.,

Appellees.

UNITED STATES SENATE,

Appellant,

v.

MIKE SYNAR, Member of Congress, et al.,

Appellees.

THOMAS P. O'NEILL, Jr., Speaker of the United States House of Representatives, et al.,

Appellants,

v.

MIKE SYNAR, Member of Congress, et al.,

Appellees.

On Appeal from the United States District Court for the District of Columbia

MOTION FOR LEAVE TO FILE BRIEF *AMICUS* OUT OF TIME

NEIL H. COGAN
Attorney of Record
Storey Hall #302
Southern Methodist University
School of Law
Dallas, Texas 75275
(214) 692-2579

app

Nos. 85-1377, 85-1378, 85-1379

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

UNITED STATES SENATE, APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET.AL., APPELLEES

MOTION FOR LEAVE TO FILE

AMICUS CURIAE

OUT OF TIME

Please note that on April 15, 1986, the undersigned will move for an order granting the American Jewish Congress leave to file its brief *amicus curiae* out-of-time for the reasons stated in the attached affidavit.

Respectfully submitted

Marc D. Stern
American Jewish Congress
15 East 84th Street
New York, New York 10028
(212) 879-4500

Nos. 85-1377, 85-1378, 85-1379

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

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v.

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THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL., APPELLANT

v.

MIKE SYNAR, MEMBER OF CONGRESS, ET AL., APPELLEES

AFFIDAVIT

ss: STATE OF NEW YORK
COUNTY OF NEW YORK

Marc D. Stern, a member of the Bar of this Court, being properly sworn, deposes and says:

1. I submit this affidavit in support of the motion of the American Jewish Congress, ("AJCongress") for leave to file its brief <u>amicus</u> <u>curiae</u> out-of-time in the above-captioned case.

2. When this Court announced on February 24, 1986, 54 U.S.L.W. 3561 (1986), that it would hear the appeals in these cases, the undersigned contacted AJCongress' Washington office and directed it to find out from counsel for Synar what the briefing schedule would be.

3. In reply, I received the attached memorandum, noting only an April 9th filing date. Furthermore, none of the letters consenting to the filing of the brief <u>amicus</u>, nor indeed, the Court's order of February 24th, made a reference to the fact that the agreed upon briefing schedule required service by any specific time on April 9th.

4. In accordance with my usual practice, and in reliance on Rule 28.2 of this Court, I instructed my printer, Bar Press, Inc., to mail the brief to the Court and the parties. But for the unusual provisions of

Court's scheduling order, the brief would have been filed in timely fashion.

Marc D. Stern

SWORN TO BEFORE ME
THIS 11th DAY OF APRIL 1986

NOTARY PUBLIC

Synar

American Jewish Congress
WASHINGTON OFFICE
2027 Massachusetts Avenue, N.W. • Washington, D.C. 20036
(202) 332-4001

MARC A. PEARL
Washington Representative

TRACY SALKOWITZ
Regional Director

March 6, 1986

To: Marc Stern

Fr: Kim Treiger

Re: Gramm-Rudman Supreme Court Case

The District Court decision and the brief filed by the National Treasury Employees Union, are being delivered (overnight mail) to Professor Neil Cogan today. (His street address is, for your information, 3315 Daniel Avenue.) The names of the two lawyers at the NTEU are Lois Williams and Greg O'Gooden.

Additional briefs should be requested from the parties that entered the case, which are as follows:

1. Neil Koslowe-Civil Division, Department of Justice (202) 633-3418
2. Michael Davidson-Senate Legal Counsel
3. William T. Lake-Wilmer, Cutler and Pickering/1666 K Street, NW
4. Alan Morrison (representing Mike Synar)-Public Citizen Litigation Group/200 P Street, Suite 700, NW
5. Steven Ross-General Counsel, US House

Davidson, Lake, and Ross are the "opposition".

Only one other organization has requested to file a petition in the case -- The Pacific Legal Defense Fund, on the side of the opposition.

The petition filing deadline is April 9, and oral argument is set for late April.

kt3:4

Nos. 85-1377, 85-1378 and 85-1379

IN THE

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October Term, 1985

CHARLES A. BOWSHER, Comptroller General of the United States,

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On Appeal from the United States District Court for the District of Columbia

---

BRIEF *AMICUS CURIAE* OF THE AMERICAN JEWISH CONGRESS

Neil H. Cogan
Attorney of Record
Storey Hall #302
Southern Methodist University
School of Law
Dallas, Texas 75275
(214) 692-2579

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INTEREST OF THE AMICUS

The American Jewish Congress is a membership organization of American Jews dedicated to the preservation of the political, economic, civil, and religious rights of American Jews. Its membership has set as one of its major priorities the achievement of social justice and greater economic equity. The Constitution has been interpreted to have but little to say on these economic issues. This Court has insisted that such issues are committed by the Constitution to political process. As we argue in this attached brief, the central defect of the Gramm-Rudman Balanced Budget and Emergency Deficit Reduction Act of 1985 is that it insulates these very issues from that process.

SUMMARY OF ARGUMENT

It is unconstitutional for the Balanced Budget and Emergency Deficit Control Act of 1985 to relieve the Congress and the President of the political responsibility to make taxing and spending decisions as from time to time domestic and foreign conditions warrant. The structure of the Constitution is violated by provisions that shift such responsibility from institutions responsive to the people and competent under the Constitution to an officer neither responsive nor competent. The structure of the Constitution is violated by provisions that disable the Congress and the President from making spending decisions particularized to current conditions and that authorize an officer to make gross, unparticularized decisions.

ARGUMENT

I. THE BALANCED BUDGET AND EMERGENCY DEFICIT CONTROL ACT OF 1985 VIOLATES THE FUNDAMENTAL STRUCTURE OF THE CONSTITUTION

Amicus respectfully submits that the questions presented by the parties -- the constitutionality of a delegation of legislative power, and the constitutionality of a delegation to a particular federal office -- are better presented as one more general question. Is it constitutional for the Balanced Budget and Emergency Deficit Control Act of 1985 (hereafter "Gramm-Rudman") to relieve the Congress and the President of the responsibility to make taxing and spending decisions as from time to time domestic and foreign conditions warrant? _Amicus_ submits that the structure of the Constitution -- as illumined by the text of the Constitution, the intent of the Framers and the decisions of this Court -- is violated by provisions that shift such responsibil-

ity from institutions responsive to the people and competent under the Constitution to an officer neither responsive nor competent. _Amicus_ submits that the structure is violated by provisions that disable the Congress and the President from making spending decisions particularized to current conditions and that authorize an officer to make gross, unparticularized decisions.

A. _The Textual Structure_

The taxing and spending power, first among the enumerated powers of the national government, was explicitly placed in the hands of the institution most politically responsive. The Constitution provides "[t]he Congress shall have Power to lay and collect Taxes . . . to pay the Debts and provide for the Common Defense and general Welfare of the United States . . . ." U.S. Const. Art. I, § 8, cl. 1; _see_ _id_., Art.

I, § 8, cl. 2 ("to borrow money on the credit of the United States"). The Constitution provides further that "[a]ll Bills for raising Revenue shall originate in the House of Representatives . . . ." id., Art. I, § 7, cl. 1, the only house that originally was directly elected by the people and the house still most politically responsive to the people.

The Constitution imposed special responsibilities upon the Congress and the President and required that they develop special competences. The Constitution provides that Congress must particularize appropriations and that the President must particularize expenditures; it provides:

> No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipt and Expenditures of all public Money shall be published from time to time.

Id., Art. I, § 9, cl. 7. The Constitution requires the Congress to make appropriations, and take other measures, as conditions warrant; it provides for a periodic report and recommendation by the President to the Congress regarding "such Measures as he shall deem necessary." Id., Art. II, § 3. The Constitution discourages long-term commitments, especially for defense, by providing that "no Appropriation of Money to [raise and support armies] shall be for a longer Term than two Years." Id., Art. I, § 8, cl. 12. The publication of appropriations and expenditures enables the people to learn what the political departments are doing and to require that the political departments be politically responsive; the limitation on commitments disables the Congress and the President from

disregarding public opinion, at least on defense matters.

The Constitution places upon the President the responsibility to examine each bill presented by the Congress provision by provision, and, if he or she does not approve, to particularize the objections to the bill. See id., Art. I, § 7, cl. 2. Thus, in the case of a spending bill, the President has a duty to examine each appropriation and to make particularized objections as to the amount of, or need for, the appropriation. The Congress, in turn, has the responsibility to enter the President's objections on its journals and to consider them. See id. If the Congress nevertheless votes to enact the bill objected to, including a spending bill objected to, the vote must be by a roll-call and the votes of each voting member of Congress entered in the journals,

see id., so that the people will know who voted for or against the appropriations and be able to express their opinions to those persons.

Once a bill is signed or passed over a President's objections, the President has the responsibility to "take care that the laws be faithfully executed . . . ." *Id.*, Art. II, § 3 B.

B. The Framers' Intent

The Framers intended that the national government have the power to tax and spend "requisite to the full accomplishment of the objects committed to its care and the complete execution of the trusts for which it is responsible." The *Federalist* No. 31, p. 195. J. Cooke ed. 1961 (hereinafter "*The Federalist*").*[1] Other remarks in Alexander Hamilton's *Federalist* essays make this apparent.

The need for a national government with

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*[1] There was of course a prohibition on a "capitation, or other direct, Tax," U.S. (cont'd next page)

a "full" and "complete" power to tax and spend was a primary motive for the calling of the Constitutional Convention. See The Federalist No. 30, p. 189; J. Rakove, The Beginnings of National Politics xiv, xv (1979). The Framers believed that the "structure of the government" was the best protection against abuse of the taxing and spending power. The Federalist No. 31, p. 197; this structure included decision-making by "[i]nquisitive and enlightened Statemen," who were "deemed everywhere best qualified" for such decisions. The Federalist No. 36, p. 224. Ultimately, of course, protection lay in "the Prudence and firmness of the people." The Federalist No. 31, p. 198.

Footnote*1 cont'd
Const., Art. I, § 9, cl. 4, and there still is a prohibition on a tax on "Articles exported from any State." Id., cl. 5. Alexander Hamilton's Federalist essays make this apparent.

The Framers believed it was improper and unwise to disable the new national government from raising and spending "fresh resources" in the event of a crisis. The Federalist No. 30, p. 192. Hamilton said:

> As the duties of superintending the national defence and of securing the public peace against foreign or domestic violence, involve a provision for casualties and dangers, to which no possible limits can be assigned, the power of making that provision ought to know no other bounds than the exigencies of the nation and the resources of the community.

The Federalist No. 31, p. 196. Responding to arguments that there should be fixed limits on national expenditures, Hamilton said:

> But would it be wise, or would it not rather be the extreme of folly to stop at this point [i.e., limitation], and to leave the Government entrusted with the care of the National defence, in a state of absolute incapacity to provide for the protection of the community, against future invasions of the public peace, by foreign war, or domestic convulsions?

The Federalist No. 34, p. 211.

C. <u>This Court's Decisions</u>

Respondents argued below that Gramm-Rudman effected a delegation of power from the Congress to an officer in violation of the separation of powers doctrine. <u>Amicus</u> submits that Gramm-Rudman is a delegation of power -- or, better, an abdication of power -- in violation of the structure of the Constitution.

While this Court has decided indefinite delegations of power as separation of power issues, <u>see</u> <u>Panama Refining Co. v. Ryan</u>, 293 U.S. 388 (1935) this Court has also discussed delegations of power as structural issues. <u>See</u> J. Freedman, <u>Delegation of Power and Institutional Competence</u>, 43 U. Chi. L. Rev. 307 (1976); <u>cf</u>. <u>Industrial Union Dep't v. American</u>

Petroleum Institute, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring).

In National Cable Television Ass'n v. United States, 415 U.S. 336 (1974), this Court suggested that the Congress could not delegate the power to tax. In National Cable Television, the Federal Communications Commission had imposed on cable systems a fee based on the number of their subscribers. See id. at 340. This method, the Court said, raised constitutional problems; as a consequence, the Court said it would construe the "Act [under which the Commission set the fee] narrowly to avoid the constitutional problems."

The problem was that the fee looked like a tax, because it was based not on the benefit conferred by the Commission upon the cable systems, but on the "public policy" of encouraging or discouraging such

systems. See id. at 340-41. "Public policy" in the "search of revenue" is a matter for the Appropriations Committee of the House, the Court said. Id. at 341. Encouraging or discouraging activity through assessments "are in the nature of 'taxes', which under our constitutional regime are traditionally levied by Congress." Id. "Congress . . . is the sole organ for levying taxes . . . ." Id. at 340.

This Court has implied on other occasions too that certain basic policy decisions must be made by the political departments. In Hampton v. Mow Sun Wong, 426 U.S. 88 (1976), this Court would not consider an interest asserted by the Civil Service Commission -- an interest in the naturalization of aliens -- because the Court said only the Congress and the

President could decide whether to further that interest. *See id.* at 103-05.*[2]

In *Regents of the University of California v. Bakke*, 438 U.S. 265, 309 (1978), Mr. Justice Powell indicated that university regents are not competent to further an interest in remedying societal discrimination. By contrast, Justice Powell indicated in *Fullilove v. Klutznick*, 448 U.S. 448, 500 (1980), that Congress had a special competence to remedy discrimination. *See id.* at 472-73 (opinion of Burger, C.J. joined by White and Powell, JJ.) Thus, on at least three occasions, this Court and members thereof have implicitly recognized that certain

*[2] In so holding, the Court quoted an earlier decision that "'the power to exclude or to expel aliens [or, on the contrary, to encourage entry and naturalization] is vested in the political departments of the government . . . .'" *Id.* at 101 n. 31, *quoting Fong Yue Ting v. United States*, 149 U.S. 698, 713 (1893).

national decisions must be made not by delegates but by the politically responsive and competent departments of government, the Congress and the President. Those instances -- the imposition of a tax on cable subscribers; the promulgation of a civil service regulation to encourage naturalization; and the adoption of an affirmative action plan -- are not constitutionally different from the level of domestic and national defense appropriations. The political responsibility of the Congress and the President is equally strong, if not stronger, to decide the level of national appropriations as it is to decide a cable tax, a civil service regulation, or an affirmative action plan. The text of the Constitution and Hamilton's essays make it plain that the Congress and the President have the sole responsibility to decide

program by program the level of appropriations for such matters as the procurement of defensive weapons, military assistance to our allies, and humane support for those in despair.

Gramm-Rudman violates the structure of government as the Constitution's text describes it and the Framers intended it. Gramm-Rudman places ultimate responsibility for appropriations in the hands of an official with no known competence for such decisions, and certainly no constitutionally recognized competence. The official is not a deliberative body (and, indeed under the Act, has but five days to make decisions) and is not responsive to the people. Gramm-Rudman disables the Congress from directing that more be spent than the official decides, no matter what conditions warrant and no matter what additional revenue the Congress raises.

CONCLUSION

Gramm-Rudman constitutes a major structural change in our Constitution. The advocates of Gramm-Rudman wish such changes. See S.J.R. 13 and S.J.R. 225 (99th Cong., 1st Sess. 1985). But, if such change is prudent, the route is constitutional amendment and not simple legislation.

Respectfully submitted,

Neil H. Cogan
Attorney for Amicus Curiae
Southern Methodist
University School of Law
3315 Daniel Avenue
Dallas, Texas 75275
(214) 692-2579

April, 1986

(21) (20) (21)

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Motion For Leave To File Brief of Amicus Curiae Out of Time

ERIC H. KARP,
Counsel of Record,
NANCY I. BLUEWEISS,
FRIEDMAN, HANDLER & KARP,
45 Bromfield Street,
Boston, Massachusetts 02108
(617) 451-0191

BENJAMIN D. FEDER,
90 Maple Avenue,
White Plains, New York 10601
(914) 761-1300

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

5PP

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Motion For Leave To File Brief of Amicus Curiae Out of Time

Mr. Edward Blankstein of Princeton, New Jersey, respectfully applies for leave to file a brief as *amicus curiae* out of time. As grounds therefor, the *amicus* states as follows:

A. The issues presented in these appeals involve the constitutionality of the Balanced Budget and Emergency Deficit Control Act of 1985 ("The Act"), Pub. L. No. 99-77, 99 Stat. 1037. The Act, insofar as it significantly alters the federal budget process, presents questions of substantial public importance.

B. The *amicus* is Director of Student Financial Aid at post-secondary institutions in 22 states. His concern is with the impact of spending reductions required by the Act on the Title IV Student Financial Assistance Programs, 20 U.S.C. 1001 *et seq*. The *amicus* processes over 30,000 individual student financial aid applications each year. The Title IV Student Financial Assistance Programs absorbed a reduction of $210.141 million for fiscal year 1986.

C. The Brief of *Amicus Curiae* Edward Blankstein was filed with the Clerk of this Court on Wednesday, April 9, 1986; 40 copies of same were deposited in a United States Post Office, with first-class postage prepaid, properly addressed to the Clerk of this Court. In conformity with Rule 28.2 of the Rules of this Court, the Brief of *Amicus Curiae* Edward Blankstein was accompanied by a notarized statement of the undersigned, a member of the Bar of this Court, setting forth the details of the mailing. The brief was received by the Clerk the following day, Thursday, April 10, 1986.

D. In conformity with Rule 28.3 of the Rules of this Court, three copies of the Brief of *Amicus Curiae* Edward Blankstein were served by first-class mail, postage prepaid, on each party separately represented in these appeals. A Certificate of Service and an Affidavit of Service also accompanied the brief.

E. The Brief of *Amicus Curiae* Edward Blankstein was accompanied by consents to the filing of same duly executed by each party to these appeals in accordance with Rule 36.2 of the Rules of this Court.

F. The undersigned was not aware of and did not receive any notice of the Order of this Court which required the briefs of the appellees to be hand delivered to this Court by 3:00 P.M., and to the parties by 5:00 P.M. on April 9, 1986. The undersigned relied on the Memorandum To Counsel In Cases Granted Review of February 24, 1986 and the letter to counsel from the Clerk of the same date, neither of which specified that in-hand delivery was required.

G. The Brief of *Amicus Curiae* Edward Blankstein complies in all respects with the provisions of Rule 33 of the Rules of the Court.

H. The *Amicus* has contacted each of the parties to these appeals; each has stated that no objection will be interposed to the allowance of the within Motion.

I. The *amicus* respectfully states that its proposed brief advances arguments related to the separation of powers not addressed in the briefs of the parties in the district court and suggests a new approach to the delegation doctrine. Further, the brief provides information concerning the impact of fiscal year 1986 spending reductions mandated by the Act and the manner in which they were computed not found in the briefs of the parties below.

J. The *amicus* made a good faith attempt to comply will all Rules and Orders of this Court. The failure to comply with the

Order of this Court requiring delivery of briefs in-hand was the result of excusable oversight.

Respectfully submitted,

ERIC H. KARP,
Counsel of Record,

NANCY I. BLUEWEISS,
FRIEDMAN, HANDLER, & KARP,
45 Bromfield Street,
Boston, Massachusetts 02108
(617) 451-0191

BENJAMIN D. FEDER,
90 Maple Avenue,
White Plains, New York 10601
(914) 761-1300
Attorneys for Amicus Curiae
Edward Blankstein

Dated: April 11, 1986

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Nos. 85-1377, 85-1378, 85-1379

In the
Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,
APPELLANT,
v.
MIKE SYNAR, MEMBER OF CONGRESS, ET AL.,
APPELLEES

UNITED STATES SENATE,
APPELLANT,
v.
MIKE SYNAR, MEMBER OF CONGRESS, ET AL.,
APPELLEES

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, ET AL.,
APPELLANTS,
v.
MIKE SYNAR, MEMBER OF CONGRESS, ET AL.,
APPELLEES

ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief of Amicus Curiae Edward Blankstein

ERIC H. KARP,
Counsel of Record,
NANCY I. BLUEWEISS,
FRIEDMAN, HANDLER & KARP,
45 Bromfield Street,
Boston, Massachusetts 02108
(617) 451-0191
BENJAMIN D. FEDER,
90 Maple Avenue,
White Plains, New York 10601
(914) 761-1300

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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ON APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Brief of Amicus Curiae Edward Blankstein

Interest of Amicus Curiae

Mr. Edward Blankstein of Princeton, New Jersey, *amicus curiae,* serves as Director of Student Financial Aid at post-secondary educational institutions in 22 states in all areas of

the country. At each of those institutions, he is responsible for the administration of Student Financial Assistance programs under Title IV of The Higher Education Act of 1965, as Amended, 20 U.S.C. 1001, *et seq.*

In his capacity as Director of Student Financial Aid, Mr. Blankstein processes over 30,000 individual student applications each year under the Title IV Student Financial Assistance programs he administers. These programs include the National Direct Student Loan Program, 20 U.S.C. 1087aa, the College Work-Study Program, 42 U.S.C. 2751, the Supplemental Educational Opportunity Grant Program, 20 U.S.C. 1070b, the Pell Grant Program, 20 U.S.C. 1070a, and the Guaranteed Student Loan Program, 20 U.S.C. 1071.

For fiscal year 1986, the Title IV programs suffered a cut of $210.141 million under the Balanced Budget and Emergency Deficit Control Act of 1985 ("the Act"), Pub. L. No. 99-177, 99 Stat. 1037; J.A. 103.[1]

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[1] The $210.141 million dollar cut was specified in the Sequestration Report for Fiscal Year 1986–A Joint Report to the Comptroller General of the United States, 51 Fed. Reg. 1917 (1986). It remained unchanged in the Comptroller General's Report. United States General Accounting Office, Budget Reductions for FY 1986, Report To The President And The Congress ("GAO Report"), 51 Fed. Reg. 2811 (1986).

The Guaranteed Student Loan Program is governed by special rules set out in the Act. Act § 256(c); J.A. 150-151.

On February 1, 1986, the Secretary of Education transmitted to the Speaker of the House of Representatives a report specifying the effect of the Act on each program, project or activity of the Department of Education. H.R. Doc. No. 99-160, 99 Cong. 2d Sess. 314 (1986). The Secretary reported the following:

	Budgetary Resources ($000)	
Program, Project, Activity	Base	Sequester
1. Pell grants	$3,588,000	$154,284
2. Supplemental educational opportunity grants	412,500	17,738
3. Work-study	592,500	25,477
Direct Loans:		
4. Federal Capital contribution	190,000	8,170
5. Teacher/military cancellations	28,000	1,204
6. State student incentive grants	76,000	3,268
TOTAL	$4,887,000	$210,141

Id. at 327.

The future of these programs, and of our nation's youth for whom they were designed, is seriously imperilled by the drastic cuts in funding mandated by the Act. As a result, America's twenty-year commitment to making higher education available to all who demonstrate the motivation and the willingness to learn may be reversed without requiring members of Congress to cast a single vote.

The *amicus'* concern is with continued vitality of the Title IV Student Financial Assistance programs, programs that will continue to be adversely affected by spending cuts mandated in future fiscal years by the Act.[2] Moreover, as a veteran of the legislative process that resulted in the initial passage of Title IV and every reauthorization of and amendment thereto, Mr. Blankstein is aggrieved by the manner in which the Act insulates from public input the budgetary policy decisions constitutionally entrusted to our elected representatives in the legislative branch.

Edward Blankstein files this brief on behalf of himself, students, potential students, parents, faculty, school administrators and others who have been or will be harmed by cuts in Title IV funding in the aftermath of the Act, and who wish to preserve the tradition of governmental accountability to the electorate for fiscal policy decisions so firmly grounded in the U.S. Constitution. As *amicus*, Mr. Blankstein respectfully urges this Court to find the Act unconstitutional on its face.

---

[2] The *amicus* is also concerned that the implementation of the Act provides no forum in which to address the financial crisis facing higher education in the United States. The Report of the House Education and Labor Committee which accompanied H.R. 3700, The Higher Education Amendments of 1985, states as follows:

> In constant dollars, the value of student aid declined by 21 percent between the 1980-81 school year and the 1984-85 school year. Of particular significance is the fact that in fiscal year 1979 the maximum Pell Grant award represented 46 percent of the average cost of attendance at all postsecondary institutions in the United States. In the academic year 1984-85, the maximum Pell Grant award provided only 26 percent of the average cost of attendance. In short, while the value of all federal student aid declined by one-fifth, the purchasing power of the primary federal grant program decreased by nearly one-half.

H.R. Rep. 99-383, 99 Cong. 1st Sess. 6 (1985).

Summary of Argument

Edward Blankstein, *amicus curiae* on behalf of appellees Synar, et al., respectfully contends that the Act fails to comport with fundamental principles that underlie the Constitution's separation of powers. The Act institutionalizes a method of law-making that abrogates the commands of the Bicameralism and Presentment Clauses of Art. I, § 7 of the Constitution, as those clauses were recently explicated by this Court in *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983). Moreover, although in agreement with the result reached by the district court, the *amicus* believes that this Court should confront the question of whether the challenged statute exceeds the proper scope of Congress' ability to delegate its enumerated powers to independent and executive agencies. The delegation doctrine was designed to protect and further two major separation of powers principles: the dispersement of sovereign authority and governmental accountability to its citizens. The abdication of Congressional control over the federal budget, as contemplated by the Act, constitutes a direct challenge to those principles, one which the *amicus* respectfully urges that this Court not countenance.

Argument

I. The Act Unconstitutionally Evades the Bicameralism and Presentment Clauses of Article I, § 7, Cl. 2 of the United States Constitution.

In *Immigration & Naturalization Service* v. *Chadha*, 462 U.S. 919 (1983), this Court emphatically reaffirmed "the Framers' decision that the legislative power of the federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure." 462 U.S. at 951. In striking down the legislative veto, the device by which Congress had long sought to maintain control over executive and independent agency decisions made pursuant to delegations of leg-

islative power, this Court did no more than explicate the obvious: the procedural requirements of Article I represent a substantive judgment made by the Framers that the power of government demands careful control. The Bicameralism and Presentment mandates of Art. I, § 7 serve the essential purpose of ensuring that before the Federal Government can undertake actions that affect individual rights or needs, such actions must receive consideration from both Houses of Congress and two branches of government. *Id.* at 947-950; *See* Tribe, American Constitutional Law, § 2-2 (1978).

Continued respect for the Framers' logic mandates invalidation of the Act. The results contemplated by the Act have the intended "purpose and effect of altering the legal rights, duties, and relations of persons . . . outside the Legislative Branch," *Chadha*, 462 U.S. at 952, thus bringing it squarely within the holding and meaning of that case.

The Act purports to bring fiscal stability to the federal budget process. Faced with a deficit of over $200 billion, a national debt fast approaching $2 *trillion*, and a perceived inability to agree on the proper methods for either creating new sources of revenue or reducing government spending, Congress chose to outlaw the deficits themselves.[3] Accordingly, the Act sets a "maximum deficit amount," for each of the fiscal years 1986 through 1991, progressively eliminating equal amounts of budgetary excess (excluding fiscal year 1986) until reaching the level of zero in fiscal year 1991. Act § 201(a)(1); J.A. 103-104. To ensure the attainment of the stated levels, the Act creates an automatic mechanism that triggers spending reductions when Congress and the President fail to reach agreement on a budget that meets the Act's requirements. Act §§ 251, 252; J.A. 109, 124. The Act provides that each year (beginning August 15, except for fiscal year 1986), the Office of Management and Budget ("OMB"), an executive agency, and the Con-

[3] As aptly described by the Act's co-sponsor, "I said several months ago that it was a bad idea whose time had come. I meant simply that it is a shame that we face this alternative of essentially adopting institutional courage by statute. But that is precisely what it has come to." 131 Cong. Rec. S17403 (December 11, 1985) (Statement of Sen. Rudman).

gressional Budget Office ("CBO"), shall estimate the size of the deficit for the upcoming fiscal year. Act § 251(a)(1); J.A. 109. Within five days from this "snapshot" date, the two agencies must issue a joint report to the General Accounting Office ("GAO"). Act § 251(a)(1), (2); J.A. 109-110. The report issued to the GAO must contain OMB and CBO estimates of the deficit, and, if in excess of the maximum deficit amount for that fiscal year by more than a specified figure, their calculations for spending reductions pursuant to rules specified in the Act which purport to provide an evenhanded and proportionate sharing of the burden throughout the federal budget. Act § 251 (a)(3) and (4); J.A. 110-115. Section 251(a)(5) of the Act states that where the two agencies are unable to agree on a particular estimate necessary to calculate the budget base, or on a certain program reduction amount, "they shall average their differences to the extent necessary to produce a single, consistent set of data that achieves the required deficit reduction." J.A. 115.

Within five days of receiving the joint report, the Comptroller General must issue his own report to the President and Congress, detailing his own deficit estimates and budget reduction calculations. Act § 251(b)(1) and (2); J.A. 116-118. The Act then commands the President to issue a "sequestration" order within one week of receiving the report, implementing the budget reductions specified by the Comptroller General. Act § 252(a); J.A. 124-132. The sequestration order takes effect exactly one month after its issuance. Act § 252(a)(6)(A) and (B); J.A. 129. Within that time, Congress may agree upon its own sequestration order so as to meet the dictates of the Act, subject to Presidential veto. Act § 254(b) and (c); J.A. 139-142.

The Act divides Federal spending into two categories: defense, and non-defense, between which all necessary reductions are to be divided equally. Act § 251(a)(3); J.A. 110. Within each category, up to one half of the reduction may be achieved from the elimination of "automatic spending increases." *Id.* The remainder is to be derived from sequestering amounts on a uniform percentage from each account within

the non-defense category, and on the program, project, and activity ("PPA") level for each account within the defense category. Act § 251(a); J.A. 109-116.[4] For non-defense accounts, sequestration shall occur at the PPA level "as set forth in the most recently enacted applicable appropriations acts and accompanying committee reports. . . For programs which are not defined at the program, project or activity level, the sequestration would be applied at the account level." H.R. Rep. 99-433, 99th Cong. 1st Sess. 83 (December 10, 1985).

The issue presented is whether, in light of *Chadha*, the effects of the Act derive from a permissible method of law-making. The Act, as written, superficially addresses these concerns. Section 252(d) of the Act explicitly states, "No action taken by the President under . . . this section shall have the effect of eliminating any program, project, or activity of the Federal Government." J.A. 134. Even short of this extreme effect, however, the cuts demanded by the Act may modify or destroy the effectiveness of existing legislation in a manner that violates the Bicameralism and Presentment Clauses of Article I, § 7, and thus cannot survive constitutional scrutiny.[5]

Implementation of the Act's mandatory budget cuts raise a series of unaddressed practical and constitutional difficulties that may be highlighted by examining the case of the College Work-Study Program, 42 U.S.C. 2751 et seq. ("CWS"), a program of particular interest to the *amicus*.

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[4] The sequestration order in effect for fiscal year 1986 mandates cuts of 4.9% for defense programs, and 4.3% for non-defense programs. GAO Report, 51 Fed. Reg. 2811, 2862-2863 (1986).

[5] *See*, Hearing, *The Balanced Budget and Emergency Deficit Control Act of 1985*, Before a Subcommittee of the Committee on Government Operations, 99th Cong., 1st Sess. 137 (October 17, 1985) ("Hearing") (testimony of Charles Bowsher, Comptroller General):

> MR. FUQUA. [Could] not programs under sequestration be cut so much that they would, in effect, have to be eliminated?
>
> MR. BOWSHER. I think if our numbers get large enough and you make deep cuts in a small portion of your budget, sure, that's where you can end up.
>
> MR. FUQUA. So they could be affected.
>
> MR. BOWSHER. They could be affected to the point that you don't have an effective program. That's exactly right.

In fiscal year 1986, the Act mandated a $25.477 million spending reduction of previously appropriated CWS funds. See n.1, *supra*. The average CWS student award was approximately $675.00 for the fiscal year that ended June 30, 1985. Notification to Members of Congress Regarding P.L. 89-239, as amended, Campus Based Programs, Report No. 85-1, May, 1984 at p. 383. While the Act purports to prohibit the elimination of any program in its entirety, Act § 252(d); J.A. 134, it permits and even requires unaccountable bureaucrats to determine that tens of thousands of our nation's college students will get no College Work-Study funding. For those students, the program has been eliminated. Such a wholesale modification of this crucial program is a legislative function and must, under *Chadha*, comport with the requirements of Article I, § 7 of our Constitution.

The CWS program is a campus-based program in that the Secretary of Education is required to make institutional allotments which the participating institutions then distribute to their students based on financial need. 42 U.S.C. 2751-2756; 34 C.F.R. §§ 675.12, 675.13 (1985). The institutional allotments are computed in three stages: a conditional guarantee which ensures a minimum level of allocation, 34 C.F.R. § 675.6 (b) (1985), a state increase based on the institution's fair share of the state apportionment, 34 C.F.R. § 675.6(f) (1985), and a national increase based on the institution's fair share of the national appropriation, 34 C.F.R. § 675.6(g) (1985).

The Act does not specify whether, to what extent, or in what proportions the Secretary of Education must apply the reductions mandated by a sequestration order to an institution's conditional guarantee, its state fair share and its national fair share. The superficial and anonymous nature of the sequestration process does not include or permit any consideration of the interrelationship among the elements which form the basis for the institution's allotment under the CWS program. It also precludes any examination of the impact of the mandated spending cuts, setting the stage for an anomalous and inequitable sharing of the budget cutting burden among institutions which participate in the CWS program.

The results of this executive branch law-making are truly startling when viewed in light of the "across the board" 4.3% reduction in domestic spending mandated by the Act for fiscal year 1986. See n.4, *supra*. The *amicus* respectfully directs the Court's attention to an examination of the effects of the Act's fiscal year 1986 sequestration order on institutions located in the State of New Jersey: the Wilfred Academies of New Jersey, for which the *amicus* serves as Director of Student Financial Aid, have suffered a 10.98% reduction in the tentative CWS allocations for the 1986-1987 award year as a result of the Act; Hudson County Community College of Jersey City, New Jersey received a cut of 22.41%; and the Institute of Business and Technology of Newark, New Jersey found its 1986-1987 CWS allocation cut 23.85% due to the Act. At the same time, Princeton University of Princeton, New Jersey and Rutgers-State University of New Brunswick, New Jersey, institutions which together have a combined CWS allocation in excess of $3,000,000.00, suffered *no* reductions at all this time around. *See* 132 Cong. Rec. E 1006-1008 (April 8, 1986). Are these the kind of modest and even-handed cuts that the sponsors of the Act promised to the public?

The sequestration process cannot be analogized to agency rules promulgated pursuant to a lawful delegation of Congressional power. As this Court made plain in *Chadha*, "[Agency] action under legislatively delegated authority that might resemble 'legislative' action in some respects is not subject to the approval of both Houses of Congress and the President for the reason that the Constitution does not so require. That kind of [agency] action is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to judicial review as well as the power of Congress to modify or revoke the authority entirely." 462 U.S. at 953-954 n.16. The Act satisfies neither of those requirements. Indeed, the idea of Congressional control is antithetical to the Act's fundamental purpose, which is to remove the budget process from legislative control. *See* 131 Cong. Rec. S17404 (December 11, 1985) (Statement of Sen. Rudman). Once a sequestration order is issued, the deficit totals in the Comptroller General's

report become final, and Congress can do nothing to alter them. Act § 254(b)(1)(E); J.A. 134. Further, the Act explicitly precludes any judicial review of the "economic data, assumptions, and methodologies used . . . in computing the base levels of total revenues and total budget outlays." Act § 274(h); J.A. 162. The absence of these two factors thus brings the sequestration process squarely within the type of law-making that must, under *Chadha*, comport with the constitutional requirements of Art. I, § 7 of the Constitution.

It would be truly anomalous for this Court, after striking down the legislative veto, to uphold this exceptionally broad and unwieldy exercise of legislative authority, authority that will ultimately cause the negation of Congressional action without even the one-house review that the legislative veto required. The sequestration process, like the legislative veto, no doubt offers expediency and convenience in place of the long and sometimes arduous process of enacting a federal budget. The inevitable ramifications of those cuts, however, powerfully reinforce this Court's conclusion in *Chadha*: "With all the obvious flaws of delay [and] untidiness, . . . we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." 462 U.S. at 959.

If the Congress determines that the public interest requires the elimination of the deficit, it may do so through any combination of increased revenues and decreased outlays. The Constitution requires only that these choices be made in accordance with the legislative process as set forth in Article I of the Constitution.

II. The Act Directly Contravenes Important Separation of Powers Principles That the Delegation Doctrine Was Designed to Protect.

The doctrine limiting delegation of Congressional power to executive and independent agencies ("the delegation doctrine") has theoretical origins in the principle of separation of powers, one of the cornerstones of the United States Constitution.

In practice, however, defining the permissible scope of such delegation poses a dilemma. This Court has necessarily recog-

nized the institutional limitations of Congress and countenanced wide delegation of power, both to permit effective statutory implementation and to ensure that Congress not become overwhelmed to the point where it could no longer perform its required functions. *See, Opp Cotton Mills, Inc.* v. *Administrator of Wage & Hour Div.*, 312 U.S. 126, 145 (1941). Nonetheless, adherence to the principles of dispersement of sovereign authority and governmental accountability to the electorate remain absolutely vital to the protection of individual liberty.

The Act requires Congress to surrender too much of its constitutionally conferred discretion to formulate national policy pursuant to the Spending Power. This abdication of one of its primary legislative functions severely weakens the ability of Congress to fulfill its proper role in our tripartite system of government, and hinders the right of affected citizens to seek redress through the electoral process.

A. *The Necessity of Reconciling the Practical Requirements of Our System of Government with the Principles of Dispersement of Sovereign Authority and Electoral Accountability That Underlie the Delegation Doctrine.*

1. The Inadequacy of the "Legislative Standards" Test Alone for Guarding Against Excessive Delegations of Congressional Power.

In delegating power to an administrative entity, this Court has stated that Congress must provide an "intelligible principle," *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928), or "legislative standards," *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495, 530 (1935), in order to guide the agency's course of conduct. If Congress has sufficiently articulated a substantive choice of policy so as to limit tightly the delegate agency's discretion in choosing ends, then the legislative decision to grant broad powers of implementation to that agency will not be disturbed. *J.W. Hampton*, *supra* at 407-408.

These judicial tests, as currently applied, no longer effectively protect the separation of powers principles that underlie

the delegation doctrine. *See* McGowen, Congress, Court, and Control of Delegated Power, 77 Colum. L. Rev. 1119, 1127-1131 (1977); Ely, Democracy and Distrust, 131-134 (1980); *Industrial Union Dept.* v. *American Petroleum Inst.*, 448 U.S. 607, 672-685 (1980) (Opinion of Rehnquist, J.). One commentator has noted, "Although [a] wide range of opinions employs the same words, the opinions differ in nuance and differ widely in how they would apply the doctrine. The test has become so ephemeral and elastic as to lose its meaning. . ." Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 Mich. L. Rev. 1223, 1231 (1985).

The primary difficulty with the "legislative standards" test lies in its restricted focus — the only aspect of the delegation that receives attention is the amount of power received by the administrative agency. In view of the recognized need to permit agency latitude in choosing the means of statutory implementation, especially where difficult technical questions exist, or where the sheer scope of a substantive field requires far greater oversight than Congress may effectively handle, courts have been reluctant to place restrictions on this end of the transfer of power. *See e.g., Federal Radio Commission* v. *Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 285 (1933); Stewart, *The Reformation of American Administrative Law*, 88 Harv. L. Rev. 1667, 1695 (1975). As a result, this one dimensional approach creates the impression of an "all or nothing" dilemma confronting the judiciary, suggesting that a strict application of the delegation doctrine would demand the dismantling of the administrative system of government. *See* Schoenbrod, *supra* at 1227 (arguing that this conflict "is only apparent").

A broader methodology is needed, one which would require little retreat from previous decisions while safeguarding important separation of powers concerns, thus allowing this Court to invalidate egregious examples of Congressional abdication of responsibility without necessitating a massive restructuring of the modern administrative state.[6]

[6] *See* Wright, *Beyond Discretionary Justice*, 81 Yale L.J. 575, 582 (1972) ("To be sure, we can all join in rejecting broad formulations of the doctrine [limiting delegation] . . . But one can reject this extreme position without conceding that Congress should be permitted, in effect, to vote itself out of business.")

2. The Need for Explicit Recognition of a Complementary Strand of the Delegation Doctrine That Looks to the Power Surrendered by Congress in Addition to the Power Conferred Upon the Delegate Agency.

(a) The Delegation Doctrine Requires Judicial Inquiry into Both Sides of A Transfer of Congressional Power.

Two fundamental separation of powers principles underlie the delegation doctrine: the concern for governmental accountability to those who are governed and the desire to keep sovereign power dispersed throughout the different branches of our government in order to maintain our system's checks and balances. *Arizona* v. *California*, 373 U.S. 546, 626 (1963) (Harlan, J., dissenting); Wright, *Beyond Discretionary Justice*, *supra* at 585; Tribe, *supra* at 286 (1978). A delegation of Congressional power that confers actual discretion upon non-elected agency officials to choose substantive ends threatens these values. *Panama Refining Co.* v. *Ryan*, 293 U.S. 388, 421 (1935); *National Cable Television Ass'n* v. *United States*, 415 U.S. 336, 340-342 (1974). A similar threat arises when our elected representatives delegate power in such a manner as to avoid the exercise of their own discretion, even when the delegation confers no improper authority upon the delegatee. *American Petroleum Inst.*, *supra* at 685-687 (Opinion of Rehnquist, J.); Ely, *supra* at 132.

The district court pointed out that the "legislative standards" test is concerned exclusively with the degree to which the delegation confers the discretion to make substantive policy decisions upon non-elected administrative officials. J.A. 47. This test, however, examines only one half of the transfer of Congressional power. Even if this test can be satisfied, the judicial inquiry pursuant to the delegation doctrine should not end there. There exists a second strand within the delegation doctrine, one implicitly utilized though never explicitly recognized by this Court. This complementary strand asks a different but equally critical question: to what degree has Congress surrendered its own discretion to act pursuant to a particular legislative power?

Both delegation concerns trace back to *Schechter Poultry*. The traditional strand of the delegation doctrine, as stated, focuses on the power actually received by the executive or independent agency that serves as the delegatee. The primary inquiry is whether the substantive policy choices have been made by Congress and left to the agency for execution, or whether the delegation actually vests the agency with legislative discretion. "[W]e look [to see] whether Congress . . . has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." *Schechter Poultry*, 295 U.S. at 530.

The second strand of the delegation doctrine has its genesis in Justice Cardozo's concurring opinion in *Schechter Poultry*, in which he looked to the power Congress had actually surrendered. The delegation at issue in *Schechter Poultry* extended, in Justice Cardozo's view, to the entire breadth of Congress' power to regulate industry under the Commerce Clause. *Id.* at 553. Justice Cardozo strongly objected to the transfer by Congress of a power *en gross*: "This is delegation running riot. No such plenitude of power is susceptible of transfer." *Id.*

Congressional abdication of its duties, either through the failure to make politically difficult choices, or by refusing to exercise one of its fundamental powers, and the foisting of those duties on non-accountable agencies, raises questions that cut to the core of our system of government. *See generally*, Tribe, *supra* at 286-287.[7]

This Court has in recent years reaffirmed the importance of separation of powers principles in our constitutional system. *See Buckley* v. *Valeo*, 424 U.S. 1 (1976); *Chadha*, *supra*. The considerations that required the invalidation of the legislative veto in *Chadha* strongly support, if not mandate, the articulation by this Court of a new approach to problems raised by

[7] "[By] refusing to legislate, our legislators are escaping the sort of accountability that is crucial to the intelligible functioning of a democratic republic. . .

There can be little point in worrying about the distribution of the franchise and other personal political rights unless the important policy choices are being made by elected officials." Ely, Democracy and Distrust, 132-133 (1980).

Congressional delegation of power. *See*, Tribe, *The Legislative Veto Decision: A Law By Any Other Name?*, 21 Harv. J. on Legis. 1, 17 (1984) (disagreeing with *Chadha* but admitting its logic if it represents a trend towards "a significant judicial tightening of the limits within which Congress may entrust *anyone* with lawmaking power.") (emphasis in original). *See also* Goldsmith, *Immigration & Naturalization Service* v. *Chadha And The Nondelegation Doctrine: A Speculation*, 35 Syracuse L. Rev. 749, 754 (1984) (describing a stricter view of the delegation doctrine as the implicit "linchpin" of the *Chadha* decision). The two strand view of the delegation doctrine offers an analysis sensitive to separation of powers requirements, yet cognizant of the difficulties and needs of effective execution of legislative enactments.

The need for a stricter judicial approach to Congressional delegations has been recognized across the legal spectrum. *See, e.g., American Textile Manufacturers Inst.* v. *Donovan*, 452 U.S. 490, 547 (1981) (Rehnquist, J., dissenting); Ely, *supra* at 133; Wright, *supra* at 582-587; Schoenbrod, *supra* at 1228-1237. Explicit recognition by this Court of two interrelated strands of delegation concerns would help provide a framework for the development of this approach.

(b) The "Power Surrendered" Strand of the Delegation Doctrine, by Focusing on the Institutional Role of Congress Rather Than on the Administrative Agency, Protects the Separation of Powers Principles That Underlie the Doctrine in a Manner That the "Legislative Standards" Strand Alone Cannot.

If the separation of powers means anything, it assumes that within each branch of government there exists certain powers that are endemic to the proper functioning of that branch. *See* generally, *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579 (1952) (Executive usurpation of a legislative function); *Buckley*, *supra* (legislative usurpation of an executive function). *See also*, *Chadha*, 462 U.S. at 951 ("[T]he powers delegated to the three branches are *functionally identifiable*.") (emphasis added). The "power surrendered" strand of the del-

egation doctrine protects the underlying separation of powers principles by preventing Congress from surrendering its ability to legislate pursuant to one of its "functionally identifiable" powers. At the same time, the requirement that the legislative "power surrendered" fall within the range of "functionally identifiable" powers in order to be invalidated ensures that only exceptionally egregious Congressional delegations of power will be disturbed.

The Act contemplates nothing less than a complete surrender of the Spending Power, a power specifically entrusted in the Constitution to the legislative branch of our government. In addition to evaluating the legislative standards provided in the Act, this Court should explicitly address the question raised by Justice Cardozo in his *Schechter Poultry* concurrence: may this "plenitude of power" be delegated?

This second strand of the delegation doctrine was implicitly recognized in *National Cable Television Ass'n* v. *United States*, wherein this Court stated, "Taxation is a legislative function, and Congress [is] the sole organ for levying taxes," 415 U.S. at 340. Although the statute at issue in that case was construed narrowly, making it unnecessary to face the delegation question directly, the Court made clear that its reasoning was guided by the view that, "[i]t would be [a] sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power. . ." *Id.* at 341.[8]

The question set aside in *National Cable Television Ass'n* in regard to the Taxing Power must now be faced in regard to the Spending Power. "[The] power over the purse [may] be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people . . . for carrying into effect every just and salutory measure." Madison, The Federalist 58 (Van Doren ed. 1945). The Commerce Power (*Schechter Poultry*), the Taxing Power (*National Cable Television Ass'n*) and the Spending Power,

[8] "*National Cable Television Ass'n* v. *United States* . . . reflected some continuing vitality in that aspect of the nondelegation doctrine that safeguarded against a wholesale surrender by Congress of its legislative powers." Goldsmith, *supra* at 754-755 (citations and footnotes omitted).

powers placed within the purview of our legislative branch of government under Art. I of the Constitution, all represent a "functionally identifiable" segment of Congressional authority. This Court must not countenance the delegation of such "plenitude of power" as contemplated by the Act. Any policy decision made pursuant to such powers constitutes "a 'quintessential legislative' choice [that] must be made by the elected representatives of the people, not by non-elected officials. . ." *American Textile Manufacturers Inst.*, 452 U.S. at 547 (Rehnquist, J., dissenting).

The district court rejected the argument that there exist certain core functions (or functionally identifiable powers) within the legislative branch that are nondelegable *per se*. J.A. 43.[9] The "per se nondelegability" label, however, obscures the separation of powers concerns that require judicial scrutiny of Congressional delegations of authority. The "power surrendered" approach does not pose an absolute bar to Congressional delegations of core functions such as the taxing and spending powers, but instead prohibits Congress from relinquishing its own discretion to make the final substantive policy choice in the exercise of one of those core functions.[10] The two strands of the delegation doctrine together ensure that ultimate policy decisions may be traced directly back to Congress so that the

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[9] The district court's suggestion that there exists no basis for a qualitative distinction between different legislative functions ignores a line of precedent that stretches back to *McCulloch* v. *Maryland*, 17 U.S. 316, 407-411 (1819), in which Chief Justice Marshall took great pains to explain the difference between "the great powers . . . [of the] sword and the purse," that directly appertain to government sovereignty, which could not be exercised if not expressly granted by the Constitution, and such incidental powers, such as creating a corporation, which could be implied as a necessary means for executing the primary powers. Such a distinction, for example, underlies the epigram "The power to tax is the power to destroy." *Cf. National Cable Television Ass'n*, 415 U.S. at 341 (citing *Panhandle Oil Co.* v. *Mississippi*, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting)).

[10] The district court's reliance upon *J.W. Hampton, Jr. & Co.* v. *United States*, 276 U.S. 394, 409 (1928), to refute the contention that legislative functions are not qualitatively distinguishable, is misplaced. J.A. 43-46. This Court in *National Cable Television Ass'n* distinguished *Hampton* from the type of delegation of the taxing power that a broad reading of the statute in the later case would have contemplated.

systemic balance between Congress and the two other branches of government may be maintained.

(c) The Act Represents a Surrender by Congress of One of its "Functionally Identifiable" Powers, and Thus Threatens Both Electoral Accountability and the Dispersement of Sovereign Authority.

Under the Act, Congress divests itself of its power to control spending and places this authority in the hands of three separate agencies. Whether or not the complicated statutory formula with which these agencies must comply satisfies the minimal requirements of the "legislative standards" strand of the delegation doctrine, the Act must be held unconstitutional. Never before in this country's history has Congress relinquished so much control over the running of the nation.[11] No federal statute has ever worked to remove direct accountability to the electorate to the extent of the Act.[12] This Court should not sanction a surrender of power by Congress of the nature and magnitude contemplated by the Act.

The Senators and House Members who enacted this law may now contend that they have made the "hard choices" by commanding that the Federal budget achieve equilibrium by 1991. But who will take responsibility for the Draconian effects of the Act's allegedly "automatic" budget excisions, made through a sequestration process that has been described as a "meat ax?" 131 Cong. Rec. S17404 (December 11, 1985) (Statement of Sen. Glenn). The Act locks this Nation into a

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[11] An article in the New York Times, February 21, 1986, aptly describes the frustrations of members of Congress as they realize their inability to provide necessary funds for the Library of Congress. *New York Times*, February 21, 1986 at A20.

[12] "'If there be one principle clearer than another, it is this: that in any business, whether of government or of mere merchandising, *somebody must be trusted*, in order that when things go wrong it may be quite plain who should be punished . . . *Power and strict accountability of its use* are the essential constituents of good government.'" Levi, *Some Aspects of Separation of Powers*, 76 Columbia L. Rev. 371, 380 (1976) (quoting W. Wilson, Congressional Government: A Study in American Politics (Meridien Books ed., 1956)) (emphasis in original).

government by economic alchemy. When the necessary cuts are ordered by the President, pursuant to the report of the Comptroller General, from whom shall affected citizens seek redress? Who will be held accountable if "automatic" budget cuts are required to meet the deficit target set for Fiscal Year 1989, pursuant to a law passed in 1985? The Act presents the ultimate "legislative mirage," *American Petroleum Institute*, 448 U.S. at 681 (Opinion of Rehnquist, J.), holding forth the imagined oasis of a balanced budget, while direct responsibility for the various budget cuts required to achieve that goal lies buried in the political sand.[13]

B. *The Act Denies to All Citizens the Salutory Benefits of the Legislative Process.*

In *Chadha*, this Court took a major step towards rectifying a law-making process that was "stand[ing] the Constitution on its head. . ., H.R. Rep. 95-105, 95th Cong. 1st Sess., *reprinted in* 1 U.S. Cong. & Ad. News, 41, 53 (1977) (statement of Phillip Kurland). Prior to *Chadha*, it had become routine for Congress to delegate broad authority to executive and independent agencies, subject to the control of One-House review, thus "putting the lawmaking power in the President and the veto power in Congress." *Id.*

In the instant case, as in *Chadha*, respect for the procedural structure of government, not for its own sake, but for the sake of advancing individual liberty, dictates that Congress may

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[13] [An] objection to the nondelegation doctrine that is more often billed as dispositive, [is] that it often will not be politically convenient for legislators to resolve issues of policy. The point is one that has been reiterated, but never more succinctly than it was recently by Richard Stewart. "Individual politicians often find far more to be lost than gained in taking a readily identifiable stand on a controversial issue of social or economic policy." It's an argument, all right, but for which side? That legislators often find it convenient to escape accountability is precisely the reason *for* a nondelegation doctrine. Were it to turn out that legislators forced to govern wouldn't have the courage to do so energetically, that would often be too bad . . . but at least it would be our system.

Ely, *supra* at 133 (emphasis in original) (citation omitted).

not take shortcuts that can serve to shield individual members from possible voter retribution, especially when there exists no practical necessity or justification other than political convenience. No one denies the magnitude of the problem caused by the current Federal budget deficit. But clearly, the argument that the problem has exceeded the ability of Congress to deal with it runs contrary to the most basic principles upon which our system of government rests.[14] All the necessary means to control the deficit currently lie within Congressional control, through power to raise revenues and control spending.

Supporters of the Act contend, however, that Congress cannot do its job anymore, and that only by creating a statutory "sword of Damocles" will Congress find the impetus to make genuine progress towards resolving the current crisis — a sword that will blindly slash if Congress fails to act. *See* 131 Cong. Rec. S17401 (December 11, 1985) (Statement of Sen. Gorton). This is an argument for expediency and efficiency at the expense of deliberation and compromise, for a quick-fix treatment of the symptom rather than a well-reasoned attack at the disease. "No doubt a government with distributed authority . . . labors under restrictions from which other governments are free. It has not been our tradition to envy such governments." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. at 613 (Frankfurter, J., concurring). Congress has all the impetus it needs to act on the budget; the fact that its decisions may carry political costs only strengthens the Constitutional requirement that Congress not abdicate its responsibilities, and that each Senator and Representative stand up and be counted.

The "automatic" triggering mechanism mandated by the Act, like the legislative veto invalidated in *Chadha*, is "in many

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[14] *See, e.g.*, L. Tribe, American Constitutional Law, § 5-17 at 286 (1978):

> [L]imits on Congressional capacity to delegate responsibility derive from the implicit constitutional requirements of consensual government under law. Under any theory that finds legitimacy in the supposed consent of the governed within a framework of constitutional limitations, the cooperative exercise of accountable power presupposes the possibility of tracing every such exercise to a choice made by one of the "representative" branches, a choice for which someone can be held both politically and legally responsible.

respects a convenient shortcut; . . . but it is crystal clear . . . that the Framers ranked other values higher than efficiency." *Chadha*, 462 U.S. at 958-959. This represents the most fundamental aspect of our democratic system. Our legislative process was not designed to operate in a vacuum, but instead our Congressmen are expected to seek out and consider the differing views of their constituents and other interested parties. The process also calls for the careful study and consideration of each item of proposed legislation. What emerges in the end is neither intended to be perfect, nor to satisfy all affected. It is intended, however, to represent the widest range of opinions possible, and show signs of deliberate evaluation from among competing choices.[15]

To illustrate how our legislative process functions in the manner envisioned by the Framers, the *amicus* respectfully directs this Court's attention to H.R. 3700, The Higher Education Amendments of 1985, legislation of immense concern to Mr. Blankstein and the students he serves. H.R. 3700 passed the House by a vote of 350-67. 131 Cong. Rec. H10803 (December 4, 1985). The Senate is now considering its own version of the reauthorization, S. 1965, 99th Cong., 1st Sess. (1985).

The bill seeks "to reaffirm and improve the federal commitment to the support of postsecondary education." H.R. Rep.

[15] Consider the words of Judge Scalia, a member of the three-judge district court panel that expressly rejected the delegation argument in this case. In 1977, several years before his appointment to the Federal bench, Mr. Scalia eloquently testified before the House Committee on Government Operations on the systematic dangers of legislation that contained excessive delegation of Congressional power combined with the now unconstitutional legislative veto:

> [The] delay inherent in the bicameral legislative process; the lobbying pressure from groups proximately affected; the political cost of casting a vote one way or another on controversial substantive issues; all these are not incidental obstructions to the governmental process which the Founding Fathers simply did not envision, or were not clever enough to eliminate. They are an essential and indispensable part of our representative democracy. Their elimination is an abdication by the Congress of its constitutionally assigned responsibilities and a usurption, by the Congress and the Executive acting in concert, of a legislative power not accorded to them by the people.

H.R. Rep. 95-105, 95th Cong. 1st Sess. (1977), *reprinted in* 1 U.S. Cong. & Adm. News 41, 52 (1977) (Statement of Antonin Scalia).

99-383, 99th Cong. 1st Sess. 4 (November 20, 1985). Well aware that the current amendments to the original Higher Education Act of 1965 were scheduled to expire at the end of fiscal year 1986, Congress in February, 1985 undertook a comprehensive review of existing student financial assistance programs, taking into full account both the needs of the Act's various program beneficiaries, and the realities of the budgetary limitations currently facing the country.

The Subcommittee on Postsecondary Education of the House Education and Labor Committee held no less than 35 hearings, including twelve outside of Washington, D.C. More than one hundred institutions, organizations, associations and governmental bodies, including the *amicus*, submitted legislative recommendations. The current provisions of the Higher Education Act were examined on a line by line basis with particular emphasis on the effect of budgetary restraints on the operation of the programs. Testimony was taken at the hearings from 352 witnesses, representing a broad cross section of educational experts, teachers, administrators, and, of course, students. Based on testimony and information collected at these hearings, the Subcommittee drafted and presented a bill to the full Committee. The Committee approved the bill by an overwhelming and bipartisan vote of 28-2, and from there it passed in the House by the margin indicated above. In the words of the Chairman of the Subcommittee on Postsecondary Education, H.R. 3700 "represents a continuation of the long . . . tradition of bipartisan higher education legislation." 131 Cong. Rec. H10599 (December 3, 1985) (remarks by Rep. Ford).

H.R. 3700 represents an exhaustive and detailed approach to an issue of national concern. Each House Member's vote on H.R. 3700 was recorded and published in the Congressional Record. 131 Cong. Rec. H10803 (December 4, 1985). The bill contains hundreds of individual policy choices made in an open and accountable process in which all interested parties had an opportunity to participate. However, if the Act stands, the time and effort devoted to the reauthorization of the Higher Education Act may be rendered meaningless: unaccountable agency officials will, solely on the basis of economic forecasts,

be permitted to reverse Congressional policy choices by a procedure that is entirely insulated from public input.

One may extrapolate the example of H.R. 3700 to countless similar situations in which Congress has meticulously examined and responded to a situation that called for legislative remedy. In all these cases, the effort made to hear the testimony of concerned parties, to gather expert witnesses, to strike a painstaking balance between the perceived monetary need and the inevitable budgetary constraints, will now just be so much grist for the CBO-OMB-GAO millstone.

As one observer has noted, "If that is what the Framers intended, it is a puzzle why we even bother with elections." 131 Cong. Rec. S17408 (Statement of Sen. Riegle) (December 11, 1985) (quoting Broder, The "Rudman-Gramm Balanced Budget Sham," The Washington Post, December 11, 1985).[16]

Congress has abandoned the budget process. There will be no balancing of merits, no hearings for effected parties to air their viewpoints, and no direct accountability for the required excissions. Congressional willingness to seek out and consider differing viewpoints and carefully weigh the effects of proposed legislation as was shown in H.R. 3700, stands as the mark of our democratic process at its best; the budget cutting mechanism of the Act displays our process at its worst.[17]

C. *The Delegation Contemplated by the Act Fails to Satisfy Even the Traditional "Legislative Standards" Test for Measuring Whether Congress Has Sufficiently Limited Agency Discretion.*

The Act cannot survive even the mildest application of the traditional strand of the delegation doctrine; the legislative

[16] "The tendency is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic." *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

[17] "I have often wondered in the past two months how Thomas Jefferson or James Madison would have reacted to this proposal. I believe they would have rejected the basic concept on its face. They foresaw a country governed by human judgment, not one that is subjected to the straitjacket of automatic formulas and computer printouts." 131 Cong. Rec. S17443 (December 11, 1985) (Statement of Sen. Byrd).

standards contained therein are wholly illusory. The Act vests what CBO Director Rudolph Penner has described as "really a cosmic amount" of decision-making in unelected officials. 131 Cong. Rec. S17404 (December 11, 1985) (Statement of Sen. Glenn).

The Act instructs the Directors of the CBO and the OMB to estimate the anticipated "budget base levels of total revenues and budget outlays," for each fiscal year between 1986 and 1991, in order to determine whether the projected deficit will fall within the target level for that year, as set forth in § 201(a)(1). Act § 251(a)(1); J.A. 103, 104, 109. The estimates as to revenues and outlays thus constitute the crucial aspects of the Act's formula, since the Comptroller General's decision as to whether to sequester, and by how much, stems almost entirely from these projections.

The district court held that the Act contains constitutionally adequate legislated standards to guide the agencies in predicting budget deficits. J.A. 50. However, the district court ignored the irrefutable point that the final estimates for determining the budget outlays and total revenues ultimately depend on several economic factors that are both inherently unascertainable and subject to political influences. No matter how well Congress may instruct CBO and OMB as to existing and previous expenditures, it can no more control estimates of future economic conditions than it can predict the weather.[18] These future conditions include Real G.N.P. growth rate, unemployment, inflation, and interest rates. The district court held that "the economic calculation standards, which might seem vague and confusing to laymen, will have more precise meaning to officials accustomed to making such determinations." *Id.* A brief examination of how these "economic calculation standards" have affected the Government budget process in previous years demonstrates the groundlessness of this reasoning.

[18] "This bill places naive faith in the science of economics . . . Under this bill, billions and billions of dollars can be excised from the budget if the Government's economic forecasts show that the budget will miss the Gramm-Rudman targets . . . [I] ask, are we really going to trust our economy to some econometric equations that were never meant to deal with this kind of policy-making?" 131 Cong. Rec. S17405 (December 11, 1985) (Statement of Sen. Glenn).

In the GAO Report, one section was devoted to an explanation of the economic assumptions used in the budget calculations. 51 Fed. Reg. 2847. Table B-2 of that section, entitled "History of Forecast Errors, 1980-85," details the inaccuracies of both CBO and OMB in their budget forecasts over the previous six years, along with those of three private sector forecasting firms and two survey reports. *Id.* at 2850-2852.

The figures, reported as the difference between the predicted and the actual percentage points, speak for themselves.[19] Looking first at the Real G.N.P. growth rate, each of the seven forecasters erred by an average of over one percentage point for each year. OMB displayed the greatest total average differential, 1.7 percentage points. Wharton Econometric Forecasting Associates ("Wharton") displayed the greatest accuracy, at 1.2 percentage points. *Id.* at 2850. For inflation, the Comptroller General indicated that the seven forecasting groups all erred at a rate between 1.3 percentage points (Wharton) and 0.9 (CBO). *Id.* at 2851. For unemployment, all were virtually even in the range of error, from the American Statistical Association and National Bureau of Economic Research (ASA/NBER) average of 0.7, to the CBO total mean error of 0.5 of a percentage point. *Id.* CBO showed an average error of 1.3 percentage points for three month Treasury Bill interest rates, while OMB displayed the greatest accuracy in this area, with an error at 0.8. *Id.* at 2852.[20]

The ramifications of these marked differences between the predictions and the actual figures on the budget process are illustrated in the President's Budget Message for Fiscal Year 1987. H.R. Doc. No. 143, Office of Management and Budget, Budget of the United States Government: Fiscal Year 1987, 99th Cong., 2d Sess. (1986) ("Budget for FY 1987"). ("[The

[19] The Comptroller General saw fit to comment, "Forecast errors tend to result from developments that few if any forecasters anticipated, causing forecasts generally to err in the same direction . . . This result is more likely a reflection of the particular events occurring in those six years than it is a reflection of an underlying bias in all sources' forecasting techniques." *Id.* at 2853.

[20] Ironically, OMB's success stemmed from a period during which it did not actually forecast interest rates, but merely assumed that interest rates would fluctuate with the projected rate of inflation. 51 Fed. Reg. 2853, n.3.

sensitivity of the Budget to economic assumptions] seriously complicates budget planning because the inevitable errors in forecasting the performance of the economy lead to errors in the budget forecast." *Id.* at 2-28). Under the President's economic assumptions of February 1985, total outlays for fiscal year 1986 were estimated at $983.7 billion, while total receipts were estimated at $798.1 billion, for a total deficit of $185.6 billion. Due to forecast errors, however, total receipts are now guessed to add up to $21 billion less than anticipated, while total outlays will decrease by only $3.8 billion, thus adding an additional and wholly unanticipated $17.2 billion onto the federal deficit for fiscal year 1986. *Id.* Under the Act, the total of the required reductions in spending for fiscal year 1986 is $11.7 billion. 51 Fed. Reg. 2860. An appreciation of the history of forecast errors leads one to the conclusion that the only way to calculate the deficit for any given fiscal year is from a position of hindsight.

How great a forecasting error will it take to cause a massive effect on spending under the Act? No more than a one (1) percentage point differential between the estimated and the actual figures, which, as shown in the Comptroller General's report and outlined above, constitutes about the average total mean error for each of the seven government and private forecasting group's estimations of the key economic conditions. 51 Fed. Reg. 2849. A sustained one percentage point lower Real G.N.P. growth, for example, beginning October 1986, will decrease total receipts (and thus increase the deficit) by an estimated $6.2 billion for fiscal year 1987, $17.7 billion for fiscal year 1988, $30.5 billion for fiscal year 1989, $44.7 billion for fiscal year 1990, and $60.6 billion for fiscal year 1991. Budget for FY 1987, *supra* at 2-29.

What are the chances that a lower growth rate than predicted will actually occur? Consider the estimates for fiscal year 1986 in the Budget for FY 1987, alongside the comparison of current economic forecasts set forth by the Comptroller General. The President's budget for fiscal year 1986 assumed a 3.4% growth rate in Real G.N.P. *Id.* at 2-24. Since that time, according to the GAO Report, OMB, which supplies the estimates for the

President's budget, has revised its forecast up to 3.5%, while CBO has issued a forecast of 3.0%. 51 Fed. Reg. 2848. No other economic forecast cited by the Comptroller General estimates Real G.N.P. growth in excess of 2.9% *Id.* at 2854. Breaking down the annual rate of growth by quarters, the Comptroller General's report shows a disparity for the first quarter of 1986 reaching from OMB's high of 4.0%, down to the Data Resources, Inc. prediction of *minus* 0.6% growth. *Id.* at 2855.

Real G.N.P. growth is the crucial economic indicator in budget forecasting, insofar as all revenue estimates derive from the predicted rate of national economic expansion. *Id.* at 2857-2858. For this reason, predictions of this indicator are most susceptible to the influence of political convenience. OMB, as an arm of the Executive, has long been known to offer the rosiest picture of the upcoming economy that it could reasonably put forth. OMB predictions of Real G.N.P. are consistently higher than that of CBO or of any of the five other private forecasts set out in the GAO Report. 51 Fed. Reg. 2855. Such behavior has its dangers when these forecasts are used in their intended fashion, which is to influence Congressional spending decisions. It can be catastrophic now, if the OMB predictions (averaged together with CBO's) are permitted to ultimately determine Government spending under the Act.

All of this clearly demonstrates the utter futility of any Congressional attempts to infuse any meaningful "legislative standards" to guide or control OMB, CBO, and GAO in their budgetary calculations. Even assuming common understanding on the meaning of crucial terms of the Act, such as "real economic growth," forecasting the economy remains too uncertain. Defining "real economic growth," as the Act purports to do in § 257(6), J.A. 161, means little, when economists of equal skill and judgment will invariably reach different conclusions as to what it will be for any given year. Even when the experts generally agree, unanimity never occurs and all predictions ultimately fail to some degree.

All of this data supports the powerful point succinctly made by Rudolph Penner, in his testimony before a House Subcom-

mittee during the only hearing held in either chamber on the ramifications of the Act. Speaking to the dangers of shackeling this country's economic policy to the vicissitudes of economic forecasting, he stated:

> We have to make a large number of more or less arbitrary choices, and substantial errors are possible. . . . We might trigger a sequester when subsequent events show that it was unnecessary. . . It is hard to think of other instances where unelected officials have such power to do good or evil.

Hearing at 157 (Testimony of Rudolph Penner, Director, CBO).

Upon the calculations of the Comptroller General, based on the CBO/OMB report, rest the reversal of thousands of individual spending decisions carefully made by Congress pursuant to its specifically enumerated powers under Article I. There exists no way that Congress can provide any standards that will reduce the inevitable risk of error. The notion that so many people will be affected by the economic estimates and predictions of the unelected officials employed by OMB, CBO, and GAO, well-intentioned but inevitably subject to the limitations inherent in economic forecasting, flies in the face of the values served by our Republican form of government.

Justice Brandeis once wrote,

> The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, *to save the people from autocracy.*

Myers v. *United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (emphasis added).

Such autocracy has arrived, in the form of government by economic alchemy. If the principles of dispersement of sovereign power and governmental accountability remain worthy of protection, this Court should not hesitate to utilize the delegation doctrine, and hold the Act invalid.

Conclusion

For the reasons stated, the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177 should be declared unconstitutional on its face.

Respectfully submitted,

ERIC H. KARP,
Counsel of Record,
NANCY I. BLUEWEISS,
FRIEDMAN, HANDLER & KARP,
45 Bromfield Street,
Boston, Massachusetts 02108
(617) 451-0191
BENJAMIN D. FEDER,
90 Maple Avenue,
White Plains, New York 10601
(914) 761-1300
Attorneys for Amicus Curiae
Edward Blankstein

27 26 27

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant,
v.
MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,
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MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
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THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
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Appellees.

On Appeals from the United States District Court for the District of Columbia

BRIEF AMICUS CURIAE OF THE NATIONAL TAX LIMITATION COMMITTEE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

RONALD A. ZUMBRUN
SAM KAZMAN
LUCINDA LOW SWARTZ
Counsel of Record
KEVIN J. HERON
Of Counsel
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686
Attorneys for Amici Curiae, The National Tax Limitation Committee and Pacific Legal Foundation

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QUESTIONS PRESENTED

1. Does Congress' limited, and constitutionally suspect, power of removal over the Comptroller General, an officer given allegedly executive duties under the Balanced Budget and Emergency Deficit Control Act, allow Congress such influence over that officer as to violate the separation of powers doctrine?

2. Does the separation of powers doctrine allow for coordination between two branches of government in the federal budget process—a process which the Constitution does not commit to either branch?

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MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Columbia

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BRIEF AMICUS CURIAE OF THE NATIONAL TAX LIMITATION COMMITTEE AND PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLANTS

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, the National Tax Limitation Committee and Pacific Legal Foundation respectfully submit this brief amicus curiae in support of appellants, Charles A. Bowsher, Comptroller General of the United States; the United States Senate; and Speaker of the House of Representatives, Thomas P. O'Neill, Jr. Consent to the filing of this brief has been obtained from counsel for all parties and copies of these consent letters have been lodged with the Clerk of this Court.

The National Tax Limitation Committee (NTLC) is a nonprofit corporation organized under the laws of California. Founded in 1975, NTLC's purpose is to bring about tax and spending limitation amendments to state constitutions, as well as the federal Constitution, and to encourage other constraints on spending and taxes. NTLC is the nation's largest citizens' lobbying group working to constitutionally limit the growth of government spending and taxes. The Committee is supported by over 600,000 individuals and 30,000 businesses, large and small. Affiliated with NTLC are Tax Limitation Research Foundation, NTLC Political Action Committee, and Taxpayers Political Action Committee.

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt, public interest organization with over 19,000 contributors and supporters located throughout the country, and with offices in Sacramento, California, and Washington, D.C. Since its establishment in 1973, PLF has been actively engaged in research and litigation over a broad spectrum of public interest issues. PLF advocates a balanced approach in dealing with public interest issues, and supports the concept that governmental decisions and policies should reflect a careful assessment of the social and economic costs and benefits involved.

INTRODUCTION

The Balanced Budget and Emergency Deficit Control Act of 1985 (Deficit Control Act) gives the Comptroller General of the United States significant responsibility for the development and execution of a balanced federal budget. As summarized by the court below, the act requires the Comptroller General to "specify levels of anticipated revenue and expenditure that determine the gross amount which must be sequestered; and . . . [to] specify which particular budget items are required to be reduced by the various provisions of the Act . . . ." *Synar v. United States*, No. 85-3945, slip op. at 43 (D.D.C. Feb. 7, 1986). Describing these duties as "executive powers," the lower court held that the Comptroller General, as an "officer removable by Congress," could not exercise those powers without running afoul of the constitutional separation of powers doctrine. *Id.* at 48.

The separation of powers doctrine stems from the intent of the Framers of the Constitution "that the powers of the three great branches of the National Government be largely separate from one another." *Buckley v. Valeo*, 424 U.S. 1, 120 (1976). While the separation of powers doctrine protects our freedom and our constitutional system of government, it cannot be interpreted as contemplating a "total separation of each of these three essential branches of Government." *Id.* at 121. Determining when one branch may have impermissibly intruded into the sphere of another, then, is a difficult issue—one which must be resolved "according to common sense and the inherent necessities of the governmental coordination." *J. W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928). As is shown below, common sense dictates a finding here that the duties imposed by the Deficit Control Act can be exercised by the Comptroller General in conformance with the Constitution.

SUMMARY OF ARGUMENT

In the instant case, the lower court held that "the powers conferred upon the Comptroller General as part of the automatic deficit reduction process are executive powers, which cannot constitutionally be exercised by an officer removable by Congress . . . ." Slip op. at 48. In essence, the court decided that the Comptroller General is a "legislative" officer, unable to perform "executive" functions. Such a ruling, however, erroneously assumes that Congress' power of removal over the Comptroller General adversely affects the ability of that officer to act independently, in violation of the separation of powers doctrine.

To the contrary, Congress' removal power is limited to cause, and thus does not subject the Comptroller General to congressional caprice. Moreover, there is a substantial question as to whether a congressional attempt to remove any presidentially-appointed officer, including the Comptroller General, would pass constitutional muster. Even if Congress' removal power were upheld, however, a presidential removal power over the Comptroller General also exists. The Comptroller General is thus left fearing *both* Congress and the President as the authorities who can remove him or her, and would offer improper allegiance to neither.[1]

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[1] The lower court's ruling is incorrect on two additional grounds. First, the court neglected to recognize that the Comptroller General, as a constitutionally appointed "Officer of the United States," is authorized to "exercis[e] significant authority pursuant to the laws of the United States . . . ." (*Buckley,* 424 U.S. at 126), including that conferred by the Deficit Control Act. Second, the court's separation of powers analysis hinges upon its finding that the Comptroller General is required to exercise "executive" functions under the act. Slip op. at 43-44. Given that the Congressional Budget Officer, an officer chosen by Congress to perform "legislative" duties, exercises similar functions under the act, the basis for the court's finding is questionable at best.

ARGUMENT

I. THE FACT THAT THE COMPTROLLER GENERAL MAY BE REMOVED BY CONGRESS FOR CAUSE DOES NOT PERMIT CONGRESS TO EXERCISE UNDUE CONTROL OVER THAT OFFICER

The Comptroller General may be removed by impeachment or by "joint resolution of Congress, after notice and an opportunity for a hearing only for (i) permanent disability; (ii) inefficiency; (iii) neglect of duty; (iv) malfeasance; or (v) a felony or conduct involving moral turpitude." [2] 31 U.S.C. § 703(e)(1). While, standing alone, the terms "inefficiency," "neglect of duty," or "malfeasance" might be deemed vague and capable of broad interpretation, the procedural requirements of notice and a hearing insure that removal may not be had on a congressional whim. *See Reagan v. United States*, 182 U.S. 419, 425 (1901) ("where causes of removal are specified by Constitution or statute . . . notice and hearing are essential. [Otherwise] the appointing power could remove at pleasure or for such cause as it deemed sufficient"). Once these procedures are mandated, constitutional notions of due process would seem to require, at a minimum, a hearing in which evidence is presented, a determination based on substantial evidence, and judicial review of a final decision. Moreover, the removal of the Comptroller General for cause must be enacted by means of a joint resolution—a legislative act requiring the concurrence of a majority of both houses of Congress and the signature of the President, or the override by a two-thirds vote of a presidential veto.[3]

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[2] All officers can be removed by impeachment. U.S. Const. Art. II, § 4. That method of removal poses no separation of powers problem here. *See* slip op. at 29.

[3] *See* slip op. at 31 n.21. The removal power is thus limited to the same process by which Congress could adopt a statute abolishing the office of Comptroller General. This limited removal power simply grants to Congress a less drastic course of action.

In sum, these procedural safeguards act as a substantial check on Congress' power to remove an officer, and limit that power to circumstances of demonstrated dereliction of duty—not simply a disagreement as to policy. This power of removal may well serve to encourage the Comptroller General to carry out his or her responsibilities to the best of his or her ability, but it does not require that officer to "obey" Congress with respect to the execution of official duties.

That removal for cause does not interfere with an officer's independence was made clear by the Court in *Humphrey's Executor v. United States*, 295 U.S. 602 (1935). There the Court ruled that a Federal Trade Commissioner, who was appointed by the President for a seven-year term and who could, by statute, be removed by the President for "inefficiency, neglect of duty, or malfeasance in office" (15 U.S.C. § 41), could not be removed by the President at will. While recognizing that a President could remove at will an officer who exercised purely executive functions and who had no fixed term of office (*see Shurtleff v. United States*, 189 U.S. 311 (1903)), the Court found that a Federal Trade Commissioner exercised "predominantly quasi judicial and quasi legislative" duties and that "the fixing of a definite term subject to removal for cause . . . is enough to establish the legislative intent that the term is not to be curtailed in the absence of such cause." *Humphrey's Executor*, 295 U.S. at 623-24.

The Court's ruling in *Humphrey's Executor* teaches that the presidential power of removal for cause does not jeopardize the independence of an officer exercising nonexecutive functions. In the same way, the congressional power of removal for cause cannot be said to jeopardize the independence of an officer exercising executive functions.

Although this argument was raised below, the lower court rejected it on the ground that "the scope of execu-

tive authority over the removal of nonexecutive officers" is not necessarily equal to "the scope of congressional authority over the removal of executive officers." Slip op. at 47. Since the President's power to remove stems from the constitutional power to appoint (citing *In re Hennen,* 38 U.S. (13 Pet.) 230 (1839)), the lower court found that the "permissible impact" of this presidential removal power on an officer's independence may be stronger than the "permissible impact" of the congressional removal power on an officer's independence. *Id.* In other words, the Framers of the Constitution, by implicitly giving the President the power of removal while making no provision for congressional removal power, may have allowed for some measure of executive interference in the workings of an independent agency.

This undocumented hypothesis, however, requires a perverse reading of *Humphrey's Executor*, where the Court found that the office of Federal Trade Commissioner could be free from executive control even in light of a presidential power of removal for cause. *See* 295 U.S. at 628-29. The lower court's determination requires a contrary reading—that the presidential power of removal for cause does in fact interfere with an independent office—as well as extraordinary insight into the minds of the Framers as to their intent with respect to then-unheard-of independent agencies.

Removal for cause, whether exercised by an Executive or a Legislature, requires findings of actual dereliction of duty, not mere disagreement with respect to policy. If, as *Humphrey's Executor* held, the threat of removal for cause by a President still allows an officer to exercise his or her duties independently, then the threat of congressional removal for cause should induce no greater tremors in the minds of independent officers.[4]

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[4] The court below also rejected this analogy to *Humphrey's Executor* because the "congressional power to remove is more potent, since the Executive has no means of retaliation that may dissuade

II. CONGRESS' POWER TO REMOVE THE COMPTROLLER GENERAL SHOULD HOLD LITTLE SWAY, GIVEN THE QUESTIONABLE CONSTITUTIONALITY OF THAT POWER

The lower court invalidated the Deficit Control Act because the statute establishing the office of Comptroller General gives Congress the power to remove that officer. *See* 31 U.S.C. § 703(e)(1)(B). It is likely, however, that Congress has *no power* to remove the Comptroller General, an officer appointed by the President, and thus that the removal provision, not the act, is unconstitutional. The constitutional implications of the congressional removal provision must be examined before that statute is allowed to invalidate the otherwise constitutional Deficit Control Act.[5]

The Constitution vests in the President the power to appoint "Officers of the United States," with the advice and consent of the Senate. U.S. Const. Art. II, § 2, cl. 2. Inferior officers may be appointed by the President alone, by courts of law, or by heads of departments, depending on the dictates of Congress. *Id.* Although each House of Congress may choose its own officers (U.S. Const. Art. I, § 2, cl. 5, § 3, cl. 5) the Constitution does not permit

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Congress from exercising it . . . ." Slip op. at 48. This discussion, of course, goes to whether Congress will exercise the power, not to whether Congress' power to do so will impact the manner in which an officer carries out his or her duties. It is only the latter question which is relevant here. In any event, one could argue that the congressional power to remove is actually weaker, inasmuch as a majority of the members of both Houses of Congress and the President must be persuaded that cause for removal exists.

[5] This issue is ripe for review, despite the fact the Congress has not attempted to remove the Comptroller General, because the court below based its determination solely on the existence of the congressional removal provision. If the removal provision is found to be unconstitutional, then the duties imposed by the Deficit Control Act can be validly exercised by the Comptroller General.

Congress to appoint "Officers of the United States" or inferior officers.

As has been long recognized, the power to appoint implies the power to remove. *See, e.g., In re Hennen,* 38 U.S. at 259. While Congress may limit the ability of the President, the courts, and heads of departments to remove inferior officers (*United States v. Perkins,* 116 U.S. 483 (1886)), and may limit the President's ability to remove principal officers exercising nonexecutive functions (*Humphrey's Executor,* 295 U.S. 602), Congress may not give itself any power of removal or put itself in the removal process (*Myers v. United States,* 272 U.S. 52, 161-62, 164 (1926)). As the Court in *Myers* noted, to allow Congress the power to remove an officer, whom the President has appointed in conformance with the Appointments Clause, would be "to infringe the constitutional principle of the separation of governmental powers." 272 U.S. at 161.

The statute establishing the office of Comptroller General, which includes the congressional removal provision, was enacted in 1921.[6] The power of Congress to remove the Comptroller General was specifically debated on the floor of the House of Representatives and found to be supported by language in *In re Hennen* that

> ". . . in the absence of all constitutional or statutory provision as to the removal of such [inferior] officers, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." 59 Cong. Rec. 8610 (1920)

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[6] A similar statute was passed in 1920, but was vetoed by President Wilson because it allowed removal of the Comptroller General by concurrent resolution which does not require a presidential signature to become effective. *See* 59 Cong. Rec. 8609-10 (President's Veto Message). The House was unable to override the veto (*id.* at 8614), and Congress passed the existing statute, containing the provision for removal by joint resolution, in 1921. President Harding signed the legislation into law.

> (remarks of Rep. Good paraphrasing *In re Hennen*, 38 U.S. at 259).

Congress thus felt justified in enacting a "statutory provision" giving itself removal power.

Representative Good's quotation from *In re Hennen*, however, must be taken in context. That case concerned the power of a judge to remove at will a clerk whom he had appointed. In the legislation authorizing judges to appoint clerks, no provision for a term of office or removal was made. 38 U.S. at 258. The Court ruled that, unless a power to remove were implied, the clerk would be entitled to the position during his lifetime or good behavior:

> "It cannot, for a moment, be admitted that it was the intention of the Constitution that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or statutory regulation, it would seem to be a sound and necessary rule to consider the power of removal as incident to the power of appointment." *Id.* at 259.

Viewed in context, then, this language from *In re Hennen* cannot be used as the foundation for any *congressional* power of removal. It must also be noted that both the decision in *In re Hennen* and the 1921 removal provision preceded the Court's decision in *Myers, supra,* in which congressional authority to remove an officer was specifically disavowed.

In prior cases, the Court has considered whether various limits on the President's power to remove principal and inferior officers were constitutional. *See Shurtleff*, 189 U.S. 829; *Myers, supra; Humphrey's Executor*, 295 U.S. 602; and *Wiener v. United States*, 357 U.S. 349 (1958). While mere limitations on removal power raised the specter of potential conflicts with the separation of powers doctrine, the instant case concerns Congress'

attempt to abrogate the President's removal power entirely and to assign that power to itself. Such an effort, under the holdings of the Court, violates the principle of separation of powers.[7]

III. AS AN "OFFICER OF THE UNITED STATES," THE COMPTROLLER GENERAL IS ALSO SUBJECT TO REMOVAL BY THE PRESIDENT

The lower court's decision was based upon its ruling that, since Congress could remove the Comptroller General, it was Congress to whom the Comptroller General would look for guidance in the performance of the executive functions assigned. *See* slip op. at 48. As discussed above, this ruling is erroneous because the Comptroller General can be removed only for cause, not for simply failing to do Congress' bidding. In addition, it is not at all certain that an attempt by Congress to remove the Comptroller General would be constitutionally permissible.

Even if this Court were to find that removal for cause does not offer adequate protection and that Congress does have the power to remove the Comptroller General, the Deficit Control Act should still be upheld because, in addition to Congress' power to remove, there is a presidential power to remove the Comptroller General which cannot be abolished. If the Comptroller General can be removed by either the Legislature or the Executive, then that officer must fear both equally and would not turn to either for guidance.

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[7] The court below did address this issue, but in the context of choosing between two incompatible provisions—the powers in the Deficit Control Act or the removal authority. *See* slip op. at 32. The question, however, is not which provision should win out over the other, but whether a constitutionally infirm provision (the removal authority) can be held to negate an otherwise valid legislative enactment (the Deficit Control Act). The answer, clearly, is that it may not.

Although the Comptroller General removal provision does not state that *only* Congress may remove the Comptroller General (31 U.S.C. § 703(e)(1)), it is clear from the legislative history of the statute establishing the office that this was exactly Congress' intention. *See* 59 Cong. Rec. 8610 (1920) ("[a]nd that is what this Congress attempted to do, to take from the President the incidental right of removal, and to provide the circumstances and the methods of removal"); *see generally* 59 Cong. Rec. 8609-13 (1920) and 61 Cong. Rec. 982-92 (1921). Regardless of statutory language or congressional intent, however, the President's power to remove officers cannot be completely abrogated.

In *Shurtleff*, 189 U.S. 829, the Court considered whether the President could remove an officer who had been appointed by an earlier President with the advice and consent of the Senate. Although the statute authorizing the appointment of the officer limited removal to cause, the Court held that the "mere specification in the statute of some causes for removal [does not] exclude[] the right of the President to remove for any other reason which he, acting with a due sense of his official responsibility, should think sufficient." *Id.* at 832. This holding was followed by the Court in *Myers*, 272 U.S. 52, where it was decided that the President had the sole power to remove those officers whom he had appointed.

With respect to officers exercising nonexecutive functions, however, the Court ruled in *Humphrey's Executor* that Congress could limit the President's removal power to cause:

> "We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi legislative or quasi judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be

> doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will." 295 U.S. at 629.

Similarly, the Court in *Wiener*, 357 U.S. 349, invalidated an attempt by the President to remove an independent officer without cause. The Court found that, as to independent officers, a power of removal at will was not conferred on the President by the Constitution and could not be inferred from the applicable statute. The Court did intimate that removal for cause, while not statutorily authorized, would be available to the President. *See id.* at 356.

The proposition that can be gleaned from these cases, taken together, is that a President always has the power to remove an officer who has been appointed pursuant to the Appointments Clause, inasmuch as the power to remove derives from the power to appoint. While Congress may limit the authority of the President to remove an independent officer, that power cannot be taken away completely. Even an independent officer, duly appointed by the President, can be removed by the President for cause, statutory language or intent to the contrary notwithstanding.

The Comptroller General is an "Officer of the United States," appointed by the President with the advice and consent of the Senate. Although the lower court found that, at least under the Deficit Control Act, the Comptroller General exercises executive functions (slip op. at 43-44), it can be assumed, *arguendo*, that Congress did not intend the Comptroller General to be a purely executive officer. As a result, the President may not have complete freedom to remove the Comptroller General.

Rather, the President's power may be limited to removal for cause, *e.g.*, inefficiency, neglect of duty, or malfeasance. In no circumstances, however, can it be argued or assumed that a presidential power of removal does not exist with respect to the Comptroller General. At a minimum, the President may remove that officer for cause.

The lower court's concern that Congress can control the executive functions of the Comptroller General is thus overridden by the inherent presidential power of removal over that officer. The dual threat of a presidential and a congressional removal power are offsetting and create no compulsion on the part of the Comptroller General to "obey" either branch in the exercise of his or her duties. Without the Comptroller General's presumed allegiance to congressional dictates, then, the lower court's separation of powers concern disappears.

IV. THE LOWER COURT'S MECHANICAL APPLICATION OF THE SEPARATION OF POWERS DOCTRINE IS INAPPROPRIATE, GIVEN THAT THE BUDGETARY PROCESS IS A FUNCTION SHARED JOINTLY BY THE PRESIDENT AND CONGRESS

The lower court's determination that the automatic deficit reduction process of the Deficit Control Act violates the doctrine of separation of powers was based largely upon an unduly restrictive application of that doctrine. Referring to its decision on this matter, the lower court declared:

> "It may seem odd that this curtailment of such an important and hard-fought legislative program should hinge upon the relative technicality of authority over the Comptroller General's removal—particularly when we have rejected the more intuitive 'excessive delegation' arguments that were the focus of the attacks upon the legislation by its opponents on the floor of Congress and by the plaintiffs here. But the balance

> of separated powers established by the Constitution consists precisely of a series of technical provisions that are more important to liberty than superficially appears, and whose observance cannot be approved or rejected by the courts as the times seem to require." Slip op. at 49.

In essence, the lower court determined that "technical provisions" of the Constitution from which the separation of powers doctrine is derived require the total separation of the three branches of government. Such an approach, however, misinterprets the Framers' intent and ignores the Court's admonition that separation of powers concerns be resolved "according to common sense and the inherent necessities of the governmental coordination." *J. W. Hampton, Jr. & Co.*, 276 U.S. at 406. Amici do not contend that the separation of powers doctrine ought to be cast aside here simply because the process at issue is a vital one. To the contrary, amici believe that, within the confines of the doctrine, there is ample room for coordination between the legislative and executive branches to develop and implement a balanced federal budget.

The doctrine of separation of powers reflects the intent of the Framers of the Constitution that the three branches of government should operate independently of one another. The desire for such independence derives from Montesquieu's observation that "' "apprehensions may arise lest *the same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner." '" *Buckley*, 424 U.S. at 120, *quoting* The Federalist No. 47 (J. Madison) (emphasis in original). While the doctrine plays a critical role in insuring the balanced and equitable administration of government, it does not require each branch to function in a vacuum or completely isolated and insulated from a co-equal department. As noted by the Court in *Buckley:*

> "[I]t is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that

> the Constitution by no means contemplates total separation of each of these essential branches of Government. The President is a participant in the lawmaking process by virtue of its authority to veto bills enacted by Congress. The Senate is a participant in the appointive process by virtue of its authority to refuse to confirm persons nominated to office by the President. The men who met in Philadelphia in the summer of 1787 were practical statesmen, experienced in politics, who viewed the principle of separation of powers as a vital check against tyranny. But they likewise saw that a hermetic sealing off of the three branches of Government from one another would preclude the establishment of a Nation capable of governing itself effectively." 424 U.S. at 121.

The Framers thus acknowledged that a certain degree of interdependence within our tripartite system of government would be necessary in order to make the system function effectively. Therefore, apart from those instances in which a co-equal branch attempts to exercise a power that has been specifically conferred upon another department, there is no automatic formula for determining when the principle of separation of powers has been violated. Rather, the doctrine must be applied on a case-by-case basis with some attention given to the objectives sought to be attained by the particular arrangement being challenged.

At issue in the instant case is the process by which a balanced federal budget will be attained. Because the Constitution does not prescribe the method of formulating a federal budget, it is a process which can be, and is, shared by the executive and legislative branches, and indeed is one which *requires* a large degree of cooperation and interchange between these two departments. *See, e.g.*, 31 U.S.C. §§ 1101-13 (setting forth the President's responsibility to prepare the budget and to provide Congress with supporting information). The goal of the budget it-

self is not only "to serve as the basis of information for the Congress and the public with regard to the past work and future plans of the administration but also as the means of control of the general policy of the government by the legislative branch and of the details of administration by the executive branch." United States Congress, Senate Committee on Government Operations, *Financial Management in the Federal Government* 7 (1961). In such a situation, where a particular governmental function has not been clearly assigned to any one department, and there is no "encroachment or aggrandizement of one branch at the expense of the other" (*Buckley*, 424 U.S. at 122), the principle of separation of powers should not be rigidly invoked.

As discussed above, the separation of powers doctrine does permit cooperation and coordination between the executive and legislative branches in the budget process. Such collaborative efforts must go forward if a *balanced* budget is ever to be achieved. As a matter of sound public policy, it is essential that the President and Congress be allowed to use their budgetary powers in concert in order to restore fiscal responsibility to the federal budget.

The concept of a balanced budget, and of a process to insure its attainment, would have been favorably accepted by the Framers who understood well the ill effects resulting from excessive public debt. As stated by Thomas Jefferson, "[t]he public debt is the greatest of dangers to be feared by a republican government." *Quoted in* S. Rep. No. 163, 99th Cong., 1st Sess. 18 (1985) (report of the Senate Judiciary Committee on the Balanced Budget Constitutional Amendment). Moreover, Alexander Hamilton, "who perhaps more than any other individual, influenced the course of American economic policy during our nation's first century" (*id.*), was particularly adamant about maintaining balance in the budget:

> " 'As the vicissitudes of nations begat a perpetual tendency to the accumulation of debt, there ought to be a perpetual, anxious, and unceasing effort to reduce that which at any time exists, as fast as shall be practicable, consistent with integrity and good faith.' " *Quoted in id.*

The concerns expressed by both Jefferson and Hamilton were later echoed by early American Presidents such as John Adams, John Quincy Adams, and Andrew Jackson. President Jackson, who perhaps was among the most "uncompromising advocates of a balanced budget," eloquently expressed his views regarding the federal budget in the following manner:

> " 'Once the budget is balanced and the debts paid off, our population will be relieved from a considerable portion of its present burdens and will find not only new motives to patriotic affection, but additional means for the display of individual enterprise.' " *Quoted in id.* at 19.

As illustrated above, the Framers of the Constitution, as well as our early statesmen, were intensely concerned over the topic of the public debt and of its effects on our nation. Amici submit, therefore, that the Framers would not have been offended by a budgetary process that is shared by two co-equal branches of government or by a procedure that is designed to insure that the budget is, and remains, balanced. Furthermore, given the complexity of the process, amici contend that the separation of powers principle should be leniently applied, thus allowing the branches enough flexibility and freedom to achieve the goal of a balanced budget.

In amici's view, Congress' extremely limited authority to remove the Comptroller General, which in and of itself may transgress the Constitution, provides an insufficient basis to mechanically or reflexively apply separation of powers principles. Rather, the doctrine must be analyzed against the backdrop of congressional and presidential

intent underlying the Deficit Control Act, the public policy that it seeks to advance and, most importantly, the actual impact, if any, that the legislation in this case is likely to have on the balance of powers between Congress and the President.

CONCLUSION

For the reasons stated herein, and the arguments set forth in appellants' briefs, the decision of the United States District Court for the District of Columbia should be reversed.

Respectfully submitted,

RONALD A. ZUMBRUN
SAM KAZMAN
LUCINDA LOW SWARTZ
Counsel of Record

KEVIN J. HERON
Of Counsel
PACIFIC LEGAL FOUNDATION
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amici Curiae, The National Tax Limitation Committee and Pacific Legal Foundation

March 19, 1986

FOR ARGUMENT

Nos. 85-1377, 85-1378, 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER,
COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant,
v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,
v.

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Appellees.

On Appeal from the United States District Court for the District of Columbia

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BRIEF FOR *AMICI CURIAE* COALITION FOR HEALTH FUNDING, *ET AL.*

STEPHAN E. LAWTON *
JACK N. GOODMAN
CAROL COLBORN
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for Amici Curiae Coalition for Health Funding, et al.

April 9, 1986

* Counsel of Record

[Complete list of *Amici* on inside cover]

AMICI CURIAE

American Council on Education

American Hospital Association

Coalition for Health Funding on behalf of:

- American Academy of Pediatrics
- American Association of Colleges of Nursing
- American Association of Colleges of Pharmacy
- American Association of Colleges of Podiatric Medicine
- American Association for Dental Research
- American Association of Dental Schools
- American Heart Association
- American Lung Association
- American Nurses Association
- American Public Health Association
- Association of American Veterinary Medical Colleges
- Association of Schools of Public Health
- Association of University Programs in Health Administration
- Cystic Fibrosis Foundation
- Infectious Diseases Society of America
- March of Dimes Birth Defects Foundation
- National Association of Children's Hospitals and Related Institutions
- National Family Planning and Reproductive Health Association
- National League for Nursing
- Planned Parenthood Federation of America

Juvenile Diabetes Foundation International

National School Boards Association

Western Association of Children's Hospitals

QUESTION PRESENTED

Whether the district court properly ruled that, because the automatic deficit reduction procedures of the Balanced Budget and Emergency Deficit Control Act are unconstitutional, the President's sequestration order issued pursuant to those procedures is "without legal force and effect," thereby requiring the restoration of all wrongfully cancelled funds?

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MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES
HOUSE OF REPRESENTATIVES, *et al.*,
Appellants,
v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

**On Appeal from the United States District Court
for the District of Columbia**

BRIEF FOR *AMICI CURIAE* COALITION FOR HEALTH FUNDING, *ET AL.*

The Coalition for Health Funding (the "Coalition") *et al.* submits this brief *amici curiae* on behalf of twenty-five organizations representing health and education in-

terests in support of Appellees Mike Synar, Member of Congress, *et al.* It is accompanied by the written consents of Appellants and Appellees.

INTEREST OF *AMICI CURIAE*

The Coalition for Health Funding is a nonprofit coalition of health organizations devoted to promoting and monitoring the funding of health care programs. The Coalition is joined in this brief *amici curiae* by several health and educational associations which share a similar interest in promoting funding for health and educational programs. (A list of *amici* is set forth in the Appendix attached hereto.) These associations are involved with virtually all federally-funded health and education programs. They represent the educational institutions that administer federally-funded research, public health and education grants; the providers of federally-funded health services, such as hospitals, physicians, nurses and family planning clinics; the recipients of federal research grants, student trainees and program administrators; and the voluntary health organizations that are concerned with the federally-funded programs that impact upon the health of the American public.

The March 1, 1986 sequestration order mandated by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, reduced duly enacted levels of support for most health and education programs by 4.3 percent, and reduced payments under the Medicare program by one percent. *Amici curiae* and their members were adversely impacted by these budget cuts, which forced significant curtailments in grants, traineeships and scholarships, reimbursement levels, contracts, and other health and educational services. Thus, these organizations have a direct interest in this Court's decision concerning the constitutionality of these budget reductions.

INTRODUCTION

A. The Deficit Control Act And Its Impact On Health And Education Programs

The Balanced Budget and Emergency Deficit Control Act of 1985 (the "Deficit Control Act" or "Act"), Pub. L. No. 99-177, 99 Stat. 1037 (1985), popularly known as the Gramm-Rudman Act, radically changes the federal budget process in an effort to achieve a balanced federal budget by the year 1991. In order to reach that goal, the Act imposes strict year-by-year deficit targets called "maximum deficit amounts", and adopts extraordinary new budget procedures. *See* Act §§ 201(a)(7), 251-257, J.A. 104, 109-161.

In accordance with these procedures, on January 15, 1986, the Congressional Budget Office ("CBO") and the Office of Management and Budget ("OMB") issued a joint report to the Comptroller General estimating the deficit for the 1986 fiscal year. Since they determined the deficit would exceed the designated maximum deficit amount, they calculated the requisite budget reductions for both nondefense and defense programs. The budget reductions amounted to 4.3 percent for most health and education programs, and one percent for Medicare. 51 Fed. Reg. 1917, 1930, 1934 (Jan. 15, 1986).[1] On January 21, 1986, the Comptroller General submitted his report to the President and the Congress appraising the accuracy of the CBO's and OMB's report and making minor changes. 51 Fed. Reg. 2813 (Jan. 21, 1986). Following the submission of the Comptroller General's report, on February 1, 1986, the President issued a "sequestration" order, containing the budget reductions man-

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[1] *See* Act § 256(d)(1)(A), J.A. 151 (setting the maximum permissible reduction for Medicare at one percent for fiscal year 1986).

dated in the Comptroller General's report. This sequestration became effective on March 1, 1986. S. Doc. No. 24, 99th Cong., 2d Sess. (1986); *see* Act § 252(a)(6)(A), J.A. 129. Accordingly, as of March 1, funding for all non-exempt[2] health and education programs was cut by 4.3 percent and funding for the Medicare program was cut by one percent.

The funds for health and education programs subject to the President's sequestration had all been duly authorized and appropriated by Congress.[3] The health and education programs funded under these appropriations acts include preschool, elementary, secondary and higher education, and a full range of health programs involving research, training, prevention and services. Specific programs include migrant education; early childhood education for handicapped children; student assistance for college and graduate students; maternal and child health grants; family planning services; exceptional need

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[2] Certain programs are totally exempt from Gramm-Rudman cuts. Medicaid, for example, is totally exempt. Act § 255(h), J.A. 148. Other programs are subject to special rules. *Id.* § 256, J.A. 148-158. These programs include: the Guaranteed Student Loan program, which was subject to a mandatory reduction of .4 percent in the special allowance for lenders and a .5 percent increase in the loan origination fee (51 Fed. Reg. 1932); the Community Health Centers and Indian Health Services programs, which received a one percent reduction (51 Fed. Reg. 1934); and the Vocational Rehabilitation grant program, which was subject to a reduction in the expected automatic spending increase (51 Fed. Reg. 1927, 1933).

[3] Department of Labor, Health and Human Services, Education and Related Agencies Appropriations Act for the Fiscal Year Ending September 30, 1986, Pub. L. No. 99-178, 99 Stat. 1102 (1985); Further Continuing Appropriations Act of 1985, Pub. L. No. 99-190, 99 Stat. 1185 (1985). Payment under the Medicare program is authorized under Title XVIII of the Social Security Act of 1965, as amended, Pub. L. No. 89-97 (codified at 42 U.S.C. § 1395 *et seq.*).

scholarships for health professions students; childhood immunization programs; clinical training for mental health researchers; and biomedical research on numerous life-threatening diseases, such as cancer and Acquired Immune Deficiency Syndrome (AIDS).

B. The District Court's Decision

On February 7, 1986, the three-judge district court held that the Deficit Control Act violates the separation of powers doctrine by granting executive powers to the Comptroller General, an officer removable by Congress. Because of this constitutional defect, the court concluded that "those powers cannot be exercised and therefore the automatic deficit reduction process to which they are central cannot be implemented." J.A. 78. The court issued an order declaring the automatic reduction process unconstitutional and declaring the February 1, 1986 presidential sequestration order issued pursuant to those unconstitutional procedures "without legal force and effect." J.A. 81-82. The court, as required by the judicial review provisions of the Act, stayed the effect of its judgment pending these appeals. J.A. 82.

SUMMARY OF ARGUMENT

In holding that the automatic deficit reduction procedures of the Deficit Control Act violate the separation of powers doctrine, the district court not only held that the application of the Act to future budget reductions is unconstitutional; it also declared the first reductions under the Act null and void. *Amici* endorse the arguments of Appellees in support of the district court's analysis of the constitutional issues. This brief, however, will be limited to the single issue of the district court's ruling that, because the budget reductions were made pursuant to unconstitutional procedures, the February 1, 1986 sequestration order is void and without legal effect.

In so ruling, the district court properly applied the long-standing rule of Anglo-American jurisprudence that judicial decisions are to be accorded retroactive treatment.

Nothing in this Court's decisions, including the standards established in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), dictate a departure from the normal rule of retroactivity. First, the district court's decision did not overturn prior law upon which individuals had relied. There was no justifiable reliance on the validity of the Deficit Control Act, since its dubious constitutionality was foreshadowed well before it was enacted into law and it was subject to constitutional challenge from the moment it became effective. In the absence of appropriate reliance, retroactive relief should be applied.

Second, retroactive application of the district court's decision furthers the purpose of the court's decision by denying effect to the unconstitutional withholding of duly authorized funds. Third, the equities in this case clearly favor voiding the sequestration order and restoring the funds to the innocent third parties, such as *amici*, who have had their legal rights to funds extinguished by unconstitutional procedures. Accordingly, *amici* urge the Court to affirm the district court's order entirely, including its order that the budget reductions wrongfully taken are null and void, with the effect that these reductions in lawful appropriations must be restored to the affected programs.

ARGUMENT

I. BECAUSE THE PRESIDENT'S SEQUESTRATION ORDER WAS BASED ON AN UNCONSTITUTIONAL PROCEDURE, THE ORDER IS NULL AND VOID OF ANY LEGAL EFFECT, AND THE FUNDS PERMANENTLY CANCELLED UNDER SUCH ORDER MUST BE RESTORED

The district court properly held that, since the automatic deficit reduction procedures are unconstitutional, the February 1, 1986 sequestration order issued pursuant to those procedures is null and void of any legal effect. J.A. 81-82. Moreover, in the context of discussing whether the National Treasury Employees Union ("NTEU") had standing to challenge the constitutionality of the Act, the court indicated that a judicial decision declaring the Deficit Control Act unconstitutional would require the restoration of funds:

> As to at least the second of the injuries of which NTEU complains—the imminent permanent cancellation of its members' COLA benefits by the operation of the presidential sequestration order—it is unquestionable that a judicial remedy exists. *If we declare the automatic deficit reduction process invalid, no cancellation of the COLA benefits will occur as a result of that process.* Rather, the fallback deficit reduction process established by subsection 274(f) will come into play, and any cancellation of COLAs under that process will require the passage of legislation.

J.A. 35 (footnotes omitted and emphasis added).

Nothing in this Court's decisions indicate that the district court's holding should not be applied retroactively. In *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), the Court established a three-part test for determining whether in a civil case a decision should be treated retroactively:

- *First*, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed. . . .
- *Second*, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . .
- *Finally*, "[w]here a decision . . . could produce substantial inequitable results if applied retroactively, there is ample basis . . . for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

Id. at 106-07 (citations omitted and emphasis added). The *Chevron* test developed as an exception to the longstanding rule of Anglo-American law that judicial decisions are retroactive [4] to account for those extraordinary circumstances where the Court deemed it appropriate to depart from the normal rule of retroactivity.

The initial *Chevron* factor—establishing a clear break from prior law upon which the parties relied—is the threshold test for determining whether a decision should be applied retroactively:

> Onc it has been established that a decision has "establish[ed] a new principle of law, either by overruling clear past precedent on which litigants may have relied . . . or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the Court has gone on to examine the history, purpose, and effect of the new rule, as well as the

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[4] *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 622-23 and n.6 (1965); Norton v. Shelby County, 118 U.S. 425, 442 (1886).

inequity that would be imposed by its retroactive application.

United States v. Johnson, 457 U.S. 537, 550 n.12 (1982) (*quoting Chevron*, 404 U.S. at 106-107); *see also Cash v. Califano*, 621 F.2d 626, 631 (4th Cir. 1980) (reliance is the threshold factor). In virtually all of the civil cases in which decisions have been applied prospectively, courts have determined that retroactivity was inappropriate because individuals had relied on prior law and conformed their conduct to that prior law or the *status quo ante*.[5]

In contrast, this case does not involve a rule of law which regulates individual conduct and upon which individuals have relied. Rather, it involves whether certain federal budget procedures violate the separation of powers doctrine. Thus, by its very nature, retroactive application of the district court's decision in this case raises few, if any, of the difficult issues addressed by the *Chevron* factors and this Court's other retroactivity decisions. *See Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371, 374 (1940). Assuming the *Chevron* analysis nonetheless is the starting point for determining questions of retroactivity, the *Chevron* factors clearly support affirmance of the district court's decision to accord retroactive treatment to its order declaring the presidential sequestration order void of any legal effect.[6]

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[5] *E.g.*, Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris, 463 U.S. 1073, 1105-07, 1109-10 (1982) (plurality); Northern Pipeline Construction Co. v. Marathon Oil Co., 458 U.S. 50, 88 (1981); City of Los Angeles Dept. of Power and Water v. Manhart, 435 U.S. 702, 722-23 (1978); *Chevron*, 404 U.S. at 108.

[6] The courts have also recognized that application of the *Chevron* factors "is not accomplished through a discrete reference to each separate factor, but by an analysis of how they interact with one another." *Cash v. Califano*, 621 F.2d at 629. Thus, to deny retroactive application, a decision must not only meet the threshold

A. The Court's Decision Does Not Establish A New Principle Of Law

All of the cases in which this Court has applied decisions only prospectively emphasized the parties' appropriate reliance on the state of the law prior to the decision. Several of these cases announced completely new procedural interpretations which would have prejudiced potential plaintiffs relying on the former law from seeking relief. In *Chevron*, for instance, this Court applied prospectively its decision that the state statute of limitations applied in cases brought under the Outer Continental Shelf Lands Act, reasoning that when the plaintiff was injured and initiated his suit, he could not foresee that the prior interpretation of the statute would be overturned. "The most he could do was rely on the law as it then was." *Chevron*, 404 U.S. at 107.[7]

Other cases have involved substantive interpretations of laws in which parties had relied in good faith on prior legal precedent. In *Manhart*, this Court gave prospective treatment to its decision that Title VII of the Civil Rights Act of 1964 prohibits an employer from requiring women to make larger pension contributions in order to obtain the same monthly benefits as men, noting that its decision imposed "[d]rastic changes in the legal rules governing pension and insurance funds," and that the employer, relying on prior law, could have believed his pension plan was lawful. *Id.* at 720-21.[8]

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reliance factor; it must meet all of the *Chevron* factors. Cochran v. Birkel, 651 F.2d 1219, 1223 n.8 (6th Cir. 1981), *cert. denied*, 454 U.S. 1152 (1982).

[7] *See also Northern Pipeline*, 458 U.S. at 88; England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 422 (1964).

[8] *See also* Lemon v. Kurtzman, 411 U.S. 192 (1973) (plurality); City of Phoenix v. Kolodziejski, 399 U.S. 204, 213-15 (1970); Cipriano v. City of Houma, 395 U.S. 701, 706 (1969).

By contrast, in this case the dubious constitutionality of the Deficit Control Act was apparent even before the bill was signed into law. First, this Court's unanimous decision in *Buckley v. Valeo*, 424 U.S. 1 (1975) (per curiam), established unequivocally that legislative officials may not exercise executive duties.[9] In addition, this Court's decision in *INS v. Chadha*, 462 U.S. 919 (1983), established that legislation—as well as the repeal of duly authorized legislation—can only be enacted through constitutionally prescribed procedures. Certainly these decisions paved the way for the conclusion that the Deficit Control Act violated the fundamental principle of separation of powers.

Second, the legislative history of the Act demonstrates that Congress itself recognized that the automatic deficit reduction procedures raised serious constitutional concerns. During congressional debate on the Gramm-Rudman bill, members of Congress observed several constitutional defects in the Act.[10] Professor Laurence H.

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[9] Appellant Comptroller General points to a footnote in *Buckley v. Valeo* (424 U.S. at 128 n.165) to argue that that decision upheld the Comptroller General's authority to exercise administrative functions. Brief for Appellant Comptroller General of the United States ["GAO Brief"] at 29. Yet nothing in this Court's casual reference to the Comptroller General indicates that, as an officer removable by Congress, he is authorized to exercise the executive functions conferred on him under the Deficit Control Act. Indeed, the footnote does not even address the removal issue. Rather, the decision makes clear that "administrative functions may . . . be exercised only by persons who are 'officers of the United States.' " 424 U.S. at 141 (footnote omitted).

[10] Just prior to House passage, Representative Oakar read a letter into the record from the Chairman of the House Judiciary Committee, Representative Rodino, detailing his opposition to the bill on the grounds that this Court's decision in *Chadha* established that "Congress cannot undo a law by anything short of a new law, and that all laws must be adopted through . . . constitutionally mandated procedures . . ." and that this Court's decision in *Buckley v. Valeo* reaffirmed that "the principle of separation of powers was

Tribe also expressed his views to the Congress that the bill contained "serious [constitutional] infirmities that merit the closest attention" and that "[g]iving executive duties to a legislative officer is almost certainly unconstitutional," citing *Buckley v. Valeo.*[11]

Given these concerns regarding the constitutionality of the Act, the framers included provisions facilitating constitutional challenge. First, the Act includes a provision conferring standing upon Members of Congress to seek a declaratory judgment and injunctive relief concerning the constitutionality of the Act. Act § 274(a)(2), J.A. 163. Second, the Act includes provisions for expedited judicial review of a constittuional challenge. *Id.* § 274 (c), J.A. 164.

Moreover, Congress included in the Act a so-called "fallback deficit reduction" provision to be employed in the event the automatic deficit reduction process were declared unconstitutional. Act § 274(f), J.A. 165-66. Under the fallback provision, budget reductions can be required only by a joint resolution of Congress, signed by the President. *Id.* The fallback provision thus represents an implicit admission by Congress that if the Act were declared unconstitutional, the budget reductions would be invalid and would have to be restored, absent lawfully enacted legislation. Indeed, Appellant Comptroller General of the United States concedes this point in his brief by observing that, "[s]ince this fallback depends on the passage of another law, it is essentially a return to the *status quo ante.*" GAO Brief at 5.

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not simply an abstract generalization . . . ." 131 Cong. Rec. H11893-94 (daily ed. Dec. 11, 1985); *see also id.* H11881 (Rep. Waxman) (court should rule the law unconstitutional); *id.* H11885 (Rep. Rodino) (bill is unconstitutional); *id.* H11891 (Rep. Levine) (same).

[11] 131 Cong. Rec. H9608-09 (Nov. 1, 1985) (letter from Professor Laurence H. Tribe to Hon. Mike Synar (Oct. 22, 1985)).

Even the President, when signing the Gramm-Rudman bill into law, observed that the bill raised "serious constitutional questions":

> In signing [the Gramm-Rudman] bill, I am mindful of the serious constitutional questions raised by some of its provisions. The bill assigns a significant role to the Director of the Congressional Budget Office and the Comptroller General in calculating the budget estimates that trigger the operative provisions of the bill. Under the system of separated powers established by the Constitution, however, executive functions may only be performed by officers in the Executive Branch. The Director of the Congressional Budget Office and the Comptroller General are agents of Congress, not officers in the Executive Branch.[12]

Finally, Representative Synar initiated his suit seeking declaratory relief on the constitutionality of the Act on December 12, 1985, the same day the bill was signed into law. Thus, there was a constitutional cloud over the Act from the moment it became effective. No one could have placed any reliance on the validity of the Act at any point, for all the actions taken pursuant to its provisions took place well after its constitutionality was challenged.

A decision declaring the Deficit Control Act unconstitutional thus does not overrule clear precedent; indeed, such an outcome was foreshadowed by *Buckley v. Valeo*, as well as other Supreme Court precedent. Second, the decision does not change existing law upon which the parties relied. In *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976), the United States Court of Appeals for the District of Columbia Circuit applied a decision of this Court retroactively to require the FCC to refund illegally assessed fees where the FCC

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[12] President's Statement on Signing H.J. Resolution 327 Into Law, 21 Weekly Comp. Pres. Doc. 1490, 1491 (Dec. 12, 1985).

was unable to demonstrate justifiable reliance on the old rule:

> since the FCC had notice almost from the time it adopted the schedule that it would be subject to a challenge in court, there could be no justifiable reliance here. . . . For the same reason, because of the immediate protests and refund requests made by the petitioners, we reject any idea that the Commission would be unfairly surprised by our action today as well as the notion that petitioners' "transactions" had become final and should not be disturbed.

Id. at 1132 (footnotes omitted). The same is true in this case. From the day the bill was signed into law it was subject to a constitutional challenge, thereby removing any possibility that Appellants could be unfairly surprised by the district court's decision.

This Court has recognized that in the absence of justifiable reliance on the prior law, there is no basis for limiting relief prospectively. *See Johnson,* 457 U.S. at 550 n.12; *Lemon v. Kurtzman,* 411 U.S. at 203-06. In light of the extraordinary amount of concern over the constitutionality of the Act, and the fact that it was challenged in court on the day it became effective, there simply was no basis for reliance on the validity of the Act. Thus, since this case does not even meet the threshold reliance factor, there is no reason to apply the decision prospectively. Accordingly, the retroactivity analysis need go no further.[13]

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[13] *See Johnson,* 457 U.S. at 550 n.12; Valencia v. Anderson Bros. Ford, 617 F.2d 1278, 1289 (7th Cir. 1980) ("Having decided that our ruling in this case establishes no new principle of law, it is unnecessary to address the remaining prongs of the *Chevron Oil* test"), *rev'd on other grounds,* 452 U.S. 205 (1981); Schaefer v. First National Bank, 509 F.2d 1287, 1294-95 (7th Cir. 1975), *cert. denied,* 425 U.S. 943 (1976); Cash v. Califano, 621 F.2d at 631.

B. Requiring Restoration Of The Unlawfully Cancelled Funds Would Further The Purposes Of The Court's Decision

Even assuming, *arguendo*, that the remaining factors of the *Chevron* test need be considered, it is clear that retroactive application of the district court's decision was appropriate. The second factor under the *Chevron* framework is whether, considering the purposes and effect of the court's ruling, retroactive application "will further or retard its application." *Chevron*, 404 U.S. at 107. Thus, in *Chevron*, this Court determined that a primary purpose of the Lands Act in adopting the state statute of limitations as federal law was to aid injured employees by affording them complete and familiar remedies. Thus, to apply its decision retroactively to bar the plaintiff's claim would be "inimical to the beneficent purpose of the Congress." *Id.* at 108.

In this case, the purpose of an affirmance of the district court's order invalidating the automatic deficit reduction procedures is to maintain the delicate balance and separation of powers which underlie our constitutional framework of government. A prospective-only decision in this case which did not require restoration of withheld funds would retard operation of the rule by sanctioning the reduction of funds pursuant to unconstitutional means. It is well established that the Executive lacks any inherent constitutional power to refuse to spend funds duly appropriated by Congress. *Kendall v. United States ex. rel. Stokes*, 37 U.S. 524 (1838); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973); *National Council of Community Health Centers, Inc. v. Weinberger*, 361 F. Supp. 897 (D.D.C. 1973). Actions taken pursuant to unconstitutional procedures have no legal effect. *See INS v. Chadha*, 462 U.S. 919 (1983). Moreover, this Court has recognized in constitutional adjudication and elsewhere that federal courts have broad equitable powers to shape relief to meet the neces-

sities of a particular case. *E.g., Lemon v. Kurtzman*, 411 U.S. at 200-01; *Brown v. Board of Education*, 349 U.S. 294, 300 (1955).[14] Thus, affirmance of the district court's order would further implementation of the constitutional rule.

C. The Equities In This Case Clearly Favor Restoring The Unlawfully Cancelled Funds

The final factor considered under the *Chevron* standard is whether retroactive application of the decision would produce "substantial inequities." *Chevron*, 404 U.S. at 107. This inequity factor is closely tied to the initial reliance factor. In *Cipriano v. City of Houma*, for example, this Court concluded that retroactive application of its decision would impose "[s]ignificant hardships . . . on cities, bondholders, and others connected with municipal utilities" who had relied in good faith on the validity of the municipal financing scheme. 395 U.S. at 706. Similarly, in the *Chevron* decision itself, this Court concluded that retroactive application of its decision on the applicable statute of limitations "would also produce the most 'substantial inequitable results' to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed upon him." *Chevron*, 404 U.S. at 108 (citations omitted).

This Court has also applied the doctrine of nonretroactivity where the parties that would have been adversely affected by the Court's decision were innocent of any

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[14] For example, the federal district courts have equitable power to require funds improperly withheld to be made available for their designated purposes even where funds have reverted to the treasury, *e.g.*, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Donovan, 570 F. Supp. 210, 220 (D.D.C. 1983), or to require that funds improperly withheld in one fiscal year be spent in the following fiscal year, along with funds specially appropriated for that second fiscal year. Kennedy v. Mathews, 413 F. Supp. 1240, 1245 (D.D.C. 1976).

wrongful conduct. In *Norris,* this Court denied retroactivity where, under the new rule, "[t]he harm would fall in large part on innocent third parties." 463 U.S. at 1110 (O'Conner, J., concurring) (*quoting Manhart,* 435 U.S. at 722-23); *see also Cipriano,* 395 U.S. at 706.

In this case, retroactive application of the district court's decision would not produce such inequitable results. Indeed, *non*retroactive application of the decision would cause just the type of harm to innocent third parties, such as *amici* and their members, that this Court felt obligated to avoid in *Norris* and *Manhart.* The automatic deficit reductions have resulted in substantial harm to third parties who have been wrongfully denied their legal rights to federal funds. Indeed, because the sequestration order imposes across-the-board percentage reductions, smaller programs are most acutely affected by the unlawful withholding of funds. A chart illustrating the sequestered amounts in selected health and education programs is set forth in the Appendix attached hereto. These include mandated budget cuts eliminating:

- $236 million in funding for the National Institutes of Health ("NIH") research support, necessitating across-the-board funding cuts in all on-going research and training programs, irrespective of need or merit; [15]
- one percent in payments to all hospitals, physicians, nurses, clinics, nursing homes, medical equipment suppliers and other health care providers participating in the Medicare program who are already operating at severely reduced levels of reimbursement; [16]

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[15] U.S. Department of Health and Human Services, Report on Sequestration Under the Balanced Budget and Emergency Deficit Control Act of 1985 (Gramm-Rudman-Hollings) for Committee on Appropriations 1986, 63-92 (1986) ["HHS Sequestration Report"].

[16] U.S. Department of Health and Human Services, Health Care Financing Administration, Transmittal No. 86-2 (Feb. 1986) (in-

- $10,077,000 in funding for AIDS research at a time when scientists are coming closer to identifying the cause of and the cure for this fatal disease; [17]
- 424 training grants awarded to young researchers by the NIH; [18]
- funding for 65,000 children to receive immunizations against childhood diseases; [19]
- thirty-five grants of regional and national significance from the Maternal and Child Health program; [20]
- funds under the Community Health Centers program to expand health services in ten rural communities for an additional 50,000 people; [21]
- eighteen health professions scholarships for students in exceptional financial need; [22]
- traineeship positions for 252 public health and 100 nursing students; [23]

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structions to Medicare intermediaries for implementing one percent reduction in payments); Department of Health and Human Services, Health Care Financing Administration, Transmittal No. LM86-1 (Feb. 1986) (instructions to Medicare carriers for implementing one percent reduction in payments).

[17] S. Doc. No. 24, 99th Cong., 2d Sess. 397-430 (1986).

[18] HHS Sequestration Report at 65.

[19] Hearings on the Federal Childhood Immunization Program before the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce (Mar. 10, 1986) (statement of Chairman Waxman).

[20] HHS Sequestration Report at 5.

[21] *Id.* at 6.

[22] *Id.* at 16.

[23] *Id.* at 18, 24.

- some 290,000 middle-income college students from the Pell grant financial assistance program; [24] and
- twenty-eight projects and service to 9,209 students under the bilingual education program.[25]

Clearly the equities in this case favor the intended recipients of federal funds, such as amici, who have had their legal rights to duly authorized funds extinguished pursuant to an unlawful procedure. "[T]he equities weigh more heavily in favor of granting retroactive relief where the party bearing the burden of retroactive application can be charged with acting unlawfully." *Atlantic Richfield Co. v. FEA*, 463 F. Supp. 1079, 1086 (N.D. Cal. 1979). Simply because the restoration of funds will have a financial impact is insufficient to tip the scales of equity. "A financial impact alone is an insufficient basis to mandate nonretroactivity." *Cash v. Califano*, 621 F.2d at 632.

Moreover, as noted, since the constitutionality of the Act has always been in question, there was no basis for any reliance on its validity. In the absence of some surprise engendered by a new decision, the Appellants can hardly claim that equities support a ruling of nonretroactivity. Accordingly, this Court should affirm the district court's decision, thus requiring restoration of all funds unlawfully cancelled.

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[24] The Committee for Education Funding, Budget Impact Alert, The President's Proposed Budget for Education and Its Impact for Fiscal Year 1986, 82 (1986).

[25] *See generally id.* at 61.

CONCLUSION

For the reasons set forth herein, the decision of the district court should be affirmed.

Respectfully submitted,

STEPHAN E. LAWTON *
JACK N. GOODMAN
CAROL COLBORN
PIERSON, BALL & DOWD
1200 18th Street, N.W.
Washington, D.C. 20036
(202) 331-8566
Attorneys for Amici Curiae Coalition for Health Funding, et al.

* Counsel of Record

April 9, 1986

APPENDIX

List of *Amici Curiae*

American Council on Education

American Hospital Association

Coalition for Health Funding on behalf of:

- American Academy of Pediatrics
- American Association of Colleges of Nursing
- American Association of Colleges of Pharmacy
- American Association of Colleges of Podiatric Medicine
- American Association for Dental Research
- American Association of Dental Schools
- American Heart Association
- American Lung Association
- American Nurses Association
- American Public Health Association
- Association of American Veterinary Medical Colleges
- Association of Schools of Public Health
- Association of University Programs in Health Administration
- Cystic Fibrosis Foundation
- Infectious Diseases Society of America
- March of Dimes Birth Defects Foundation
- National Association of Children's Hospitals and Related Institutions
- National Family Planning and Reproductive Health Association
- National Leaque for Nursing
- Planned Parenthood Federation of America

Juvenile Diabetes Foundation International

National School Boards Association

Western Association of Children's Hospitals

Effects of the March 1, 1986 Sequestration Order on Selected Appropriated Health and Education Programs *

DEPARTMENT OF EDUCATION
(selected programs)

Program, project, activity	Amount Sequestered
Compensatory education for the disadvantaged	
Grants to local education agencies	$137,600,000
State agency migrant programs	11,375,000
Handicaped	6,457,000
Neglected and delinquent	1,402,000
Education for the Handicapped	
State grant program	52,268,000
Preschool incentive grants	1,290,000
Deaf-blind centers	645,000
Severely handicaped projects	215,000
Early childhood education comprehensive service delivery systems	310,000
Four deaf institutions	86,000
Vocational Rehabilitation	
State allotments	44,852,000
Client assistance	288,000
Innovation and expansion	387,000
Independent living comprehensive service	473,000
Independent living centers	989,000
Services for the older blind	215,000
Training of interpreters for the deaf	39,000
Prosthetic and orthotic education	65,000
Evaluation	77,000
National Institute of Handicapped Research	1,892,000
Helen Keller Center	185,000

* S. Doc. No. 24, 99th Cong., 2d Sess. (1986).

	Amount Sequestered
Basic grants (Title II)	$ 33,132,000
Community-based organizations (Title III-A)	322,000
National center for research in vocational education	258,000
Student Financial Assistance	
Pell grants	154,284,000
Supplemental educational opportunity	17,738,000
Work-study	25,477,000
Higher Education	
Minority institutions science improvement	215,000
Special programs for the disadvantaged	7,584,000
Special higher education projects (Center for Excellence)	258,000
Graduate/professional opportunity fellowships	505,000
Public service fellowships	107,000
National graduate fellowships	107,000
Legal training for the disadvantaged	65,000
Law school clinical experience	65,000

DEPARTMENT OF HEALTH AND HUMAN SERVICES
(selected programs)

Food and Drug Administration	
Orphan drug product grants and contracts	129,000
Acquired Immune Deficiency Syndrome (AIDS)	428,000
Health Resources and Services	
Maternal and child health state block grant	17,471,000
Black lung clinics	146,000
Family planning	6,128,000
Exceptional needs scholarships	301,000

	Amount Sequestered
Health administration grants	$ 64,00
Public health traineeships	129,000
Preventive medicine residencies	69,000
Family medicine departments	301,000
Family medicine and general dentistry residencies and training	1,548,000
Area health education centers	774,000
Disadvantaged assistance	1,097,000
Advance nurse training	710,000
Nurse traineeships	495,000
Nurse fellowships	86,000
Organ transplant network	17,000
Centers for Disease Control	
Prevention centers	64,000
Sexually transmitted diseases grants	2,000,000
Immunization grants	2,036,000
Immunization direct operations	354,000
Vaccine stockpile	172,000
New drugs for AIDS	297,000
Infectious diseases	2,027,000
National Institutes of Health	
Research project grants:	
New and competing grants	41,052,000
Renewal grants	88,978,000
Supplemental grants	753,000
Other research:	
Research centers	20,977,000
Other research	13,383,000
Research and development contracts	16,044,000
Research management and support	9,247,000
Intramural research	25,125,000
Research training awards	9,409,000
Disease control and construction	3,117,000
National Library of Medicine	2,486,000
Office of the director	5,031,000
Buildings and facilities	641,000

	Amount Sequestered
Alcohol, Drug Abuse and Mental Health Administration	
Mental health research AIDS research	$ 166,000
Mental health research All other	9,036,000
Training of health professionals in the identification & treatment of alcohol & drug abuse	43,000
Mental health clinical training all other	817,000
Drug abuse research AIDS research	239,000
Drug abuse research training	65,000
Alcoholism research training	64,000
Health Service Management	
Health services research	637,000
Smoking and health	151,000
Survey improvements for long-term care facilities & intermediate care facilities for the mentally retarded	22,000

(29) (28) (29)

Nos. 85-1377, 85-1378, and 85-1379

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

CHARLES A. BOWSHER, COMPTROLLER GENERAL OF THE UNITED STATES,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

UNITED STATES SENATE,
Appellant,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

THOMAS P. O'NEILL, JR., SPEAKER OF THE UNITED STATES HOUSE OF REPRESENTATIVES, *et al.*,
Appellants,

v.

MIKE SYNAR, MEMBER OF CONGRESS, *et al.*,
Appellees.

On Appeals from the United States District Court for the District of Columbia

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BRIEF OF HOWARD H. BAKER, JR., AS *AMICUS CURIAE*

HOWARD H. BAKER, JR.*
VINSON & ELKINS
1101 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-6500
Amicus Curiae

March 19, 1986

* Counsel of Record

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QUESTION PRESENTED

Whether the assignment of fact-finding tasks to the Comptroller General by the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, violates the constitutional separation of powers doctrine merely because the Comptroller General is removable for cause by joint resolution of Congress which then is subject to Presidential approval or veto.

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BRIEF OF HOWARD H. BAKER, JR., AS *AMICUS CURIAE*

Howard H. Baker, Jr. respectfully submits this Brief as *Amicus Curiae* in support of the appellants' position that the automatic spending reduction provisions of the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, 99 Stat. 1037 (1985), are constitutional. Written consent to the filing of this brief has been obtained from all parties. Copies of those consent letters have been filed with the Clerk of this Court.

INTEREST OF THE *AMICUS CURIAE*

United States Senators Phil Gramm, Warren B. Rudman, and Ernest F. Hollings, the three principal sponsors of what ultimately became the Balanced Budget and Emergency Deficit Control Act of 1985 (the "Act"),[1] have requested that I file a brief as *amicus curiae* in these cases. This task is not undertaken lightly. As a former member of the Legislative Branch, I can attest that the reductions in budgetary expenditures that will be compelled by the Act, if it is upheld, will not be universally popular and that proponents of the Act may suffer resulting political consequences. However, the enormous federal deficit constitutes a national emergency. As a friend of the Court, I hope that this brief will assist in deciding the constitutional issues presented in these cases by illuminating the workings of the modern budgetary process and by providing a different and broader perspective of the Act.

This perspective was obtained through eighteen years in the United States Senate, eight years in the Leadership, and four years as Majority Leader. During those years the Senate and its Leadership grappled continually,

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[1] Originally introduced in the Senate by Senators Gramm, Rudman, Hollings and others, S. 1072, 99th Cong., 1st Sess., 131 Cong. Rec. S12082 (daily ed. Sept. 25, 1985), subsequently attached by Senator Dole as an amendment to legislation raising the ceiling on the federal debt from $1.823 trillion to $2.079 trillion, H.R.J. Res. 372, 99th Cong., 1st Sess., 131 Cong. Rec. S12622 (daily ed. Oct. 4, 1985), the Act also is known as the Gramm-Rudman-Hollings Balanced Budget Amendment.

and increasingly unsuccessfully, with the problem presented by immense federal deficits. My perspective, however, deals not so much with the enormity of the problem, which must be obvious,[2] but rather with the prior unsuccessful attempts to resolve the problem, and, should the Act be invalidated, the practical political reality which renders the possibilities of obtaining another solution nearly non-existent. This legislation is singularly significant because it constitutes the best effort of the Congress in the last two decades to deal with the fiscal crisis confronting this government. This is emergency legislation not only because it is intended to solve a national budgetary crisis, but also because it is the only measure now available or realistically that will be available in the future to solve that crisis. It succeeds where prior efforts have failed.

Having been intimately involved in those prior unsuccessful efforts, I have a strong interest in the preservation of the action-forcing mechanism represented by the automatic spending reductions in the Act. While some of the parties certainly share this interest, my involvement in the process spans a different time period and provides a different perspective. Accordingly, I respectfully submit this brief in an effort to assist the Court in its consideration of the constitutional issues raised by these cases.

STATEMENT OF THE CASE

The Comptroller General's Participation in The Automatic Spending Reductions Under The Act.

The Act addresses the federal debt crisis by, first, establishing maximum deficits for 1986 and the following five fiscal years and, second, imposing automatic, across-

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[2] Estimates of the Office of Management and Budget indicate that, by the late 1980's, annual interest outlays on the federal debt will rise to levels between $160 and $180 billion. First Concurrent Resolution on the Budget—Fiscal Year 1985: Hearings Before the Senate Committee on the Budget, 98th Cong., 2d Sess. 69 (1984) (testimony of David A. Stockman, Director, OMB).

the-board spending cuts in all but those budget items designated exempt in order to preclude a deficit in excess of that maximum amount. The Act assigns the Comptroller General a fact-finding and reporting function in this process. Applying the detailed assumptions and guidelines supplied by the Act, he is required to estimate the deficit for the upcoming fiscal year, determine the deficit excess over the maximum deficit amount, and calculate the amount of the reduction in each budget category necessary to eliminate that deficit excess. Act §§ 251(a)(3), 251(a)(6), 251(b). These same estimates and calculations also are made under the Act by the Office of Management and Budget ("OMB") and the Congressional Budget Office ("CBO"). However, the findings of the OMB and the CBO are only advisory aids to the Comptroller General. It is the reported findings of the Comptroller General that form the basis of a Presidential sequestration order enforcing the budget cuts. Act § 252(a)(1). The Comptroller General's fact-finding and reporting functions are thus integral parts of the Act's automatic spending reduction mechanism.

The President and the Congress can avoid implementation of that automatic spending reduction mechanism by producing a budget resulting in a deficit equal to, or less than, the Act's maximum deficit level. Act §§ 252(c), 254(b). In the event of judicial invalidation of the automatic spending reduction mechanism, the Act provides for the submission to the Congress of the reports by the CBO and OMB, so that the Congress can consider enacting the same spending cuts called for in those reports. Act § 274(f). Absent the automatic spending reduction mechanism, however, there is no requirement that the Congress adopt the spending cuts suggested by those reports. Nor is the Congress required to make any other spending reductions. The automatic spending reduction mechanism provided in the Act thus forces the very budget restraint that has eluded lawmakers for many years.

The Proceedings Below.

The plaintiffs in the District Court made a two-pronged constitutional challenge to the Act. They argued that (1) the Act represents an unconstitutional delegation to the Comptroller General of legislative authority over appropriations and (2) the participation of the Comptroller General in the automatic spending reduction process violates the separation of powers doctrine, because the Comptroller General is not subject to removal by the President. The Department of Justice joined the plaintiffs in attacking as unconstitutional the Comptroller General's role under the Act, but defended the Act against the plaintiffs' claim of alleged unconstitutional delegation of legislative power. The United States Senate, the Speaker and the Bipartisan Leadership of the House of Representatives, and the Comptroller General intervened in defense of the Act's constitutionality.

The three-judge District Court concluded that the Act did not run afoul of any constitutional prohibition against undue delegation of legislative authority.[3] Considering the great deference afforded to the Congress by the Court on matters of delegation of legislative functions,[4] and the Act's provision of detailed guidelines to control the Comptroller General's performance of his fact-finding tasks, the District Court had little difficulty rejecting the first constitutional challenge to the Act.

Applying much stricter scrutiny to the removal powers issue, however, the District Court reached out to conclude that the separation of powers doctrine constitutionally disables the Comptroller General from performing the

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[3] *Synar* v. *United States*, No. 85-3945, slip op. (DDC Feb. 7. 1986) Joint Appendix 27, 54-55 (hereinafter cited as J.A.).

[4] The Court has invalidated statutes on the basis of unconstitutional delegation of legislative power in only two cases, both of which were decided over fifty years ago. See *A.L.A. Schechter Poultry Corp.* v. *United States*, 295 U.S. 495 (1935); *Panama Refining Co.* v. *Ryan*, 293 U.S. 388 (1935).

tasks assigned to him by the Act, because he is removable by joint resolution of the Congress subject to Presidential veto. In reaching that conclusion, the District Court focused on the functions performed by the Comptroller General under the Act in isolation from that officer's other duties, characterizing those isolated functions as purely executive in nature. J.A. 78. The District Court distinguished decisions by this Court concerning the removal powers issue as approving the Congressional restriction on Presidential removal power, but not sanctioning the assertion by the Congress of the right to confer that removal power on itself. J.A. 74-75. Despite the limited nature of the Congressional removal authority in this instance, the District Court found a violation of the separation of powers doctrine because the removal statute allegedly gives the Congress "control" over the Comptroller General who, in the District Court's estimation, performs purely executive functions under the Act. J.A. 75.

SUMMARY OF ARGUMENT

This Court's usual presumption of statutory constitutionality must be applied with great emphasis in these cases. The Act represents a concrete and detailed policy decision made by the Congress and the President to deal with record-breaking deficits that present a grave danger to the welfare of the government and the people of the United States. It represents the only currently available hope to solve the federal deficit crisis. The historical background of the budgetary process reveals the singular significance of this Act and requires the Court to afford it the highest presumption of constitutionality. In the plain absence of any constitutional necessity to nullify the Act, application of that presumption compels the affirmation of the Act's validity and the reversal of the District Court's decision.

The District Court not only failed to afford the Act the highest presumption of constitutionality, it reversed

that presumption entirely. Straining to avoid reasonable inferences and conclusions from the Constitution and prior decisions of this Court, the District Court erroneously held that the Comptroller General cannot constitutionally perform the fact-finding functions assigned to him under the Act because he is not dischargeable by the President. The District Court's finding of constitutional infirmity is required by neither the language of the Constitution nor the pronouncements of this Court.

Where, as here, there is clear Congressional intent to require independence from the President for officers whose functions are not "purely executive," the decisions of the Court recognize the constitutional authority of the Congress to restrict the power of the President to remove those officers. The functional analysis articulated in the Court's decisions, as applied to the duties performed by the Comptroller General, requires the conclusion that he is not a "purely executive" officer. The District Court discerns a constitutional defect in the Act only by erroneously focusing the analysis solely on the tasks assigned the Comptroller General under the Act and by mischaracterizing those duties as "purely executive." The Comptroller General's tasks under the Act clearly partake of the legislative, judicial and executive functions, and as such, cannot properly be characterized as "purely executive" in nature.

Where it falls within the constitutional capacity of the Congress to restrict or confer the removal power, no separation of powers violation is implicated merely because the removal is accomplished by the concurrent acts of the Congress in a joint resolution and the President via his approval or veto of such resolution. Because each is subject to Presidential approval or veto, the constitutional province of the Congress to remove the Comptroller General is no different from the Congressional authority to enact legislation abolishing the General Accounting Office of which the Comptroller General is head. As to those

officers whose functions are not "purely executive," the constitutionality of the latter action perforce establishes the constitutionality of the former.

ARGUMENT

I. AS A LEGISLATIVE AND EXECUTIVE RESPONSE TO A NATIONAL CRISIS, THE ACT IS ENTITLED TO THE HIGHEST PRESUMPTION OF CONSTITUTIONALITY.

By well established principles, the Court will indulge "[e]very possible presumption . . . in favor of the validity of a statute" in assessing its constitutionality. *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 355 (1936) (Brandeis, J., concurring) (quoting the *Sinking-Fund Cases,* 99 U.S. 700, 718 (1879)). *See Rostker* v. *Goldberg,* 453 U.S. 57, 64 (1981); *United States* v. *National Dairy Products Corp.,* 372 U.S. 29, 32 (1963). Recognizing that all statutes, whether enacted in response to a national emergency or otherwise, are subject to the demands of the Constitution, *see Immigration & Naturalization Service* v. *Chadha,* 462 U.S. 919, 945 (1983), the presumption of constitutionality should be given its full reach in light of the national crisis at hand. The crisis arises not only as a result of the titanic federal deficits, but also from the complete and utter inability of the Legislative and Executive Branches to deal with the deficit problem. This Act is the only successful effort to force a solution to the federal debt crisis which has been escalating without correction for the last two decades. Moreover, as a practical matter, it is likely to be the only available realistic solution in terms of future efforts as well. The historical overview of the budgetary process presented below reveals the circumstances that have preordained the failure of all previous efforts by the Congress and the President to solve the deficit crisis. That historical overview also portends the failure of future efforts at budgetary restraint, if the Act is invalidated.

While conferring on the Congress the dual powers to raise revenues and to spend, the Constitution does not require the Congress to confine expenditures to an amount equal to the government's revenues raised through taxes or responsible borrowing. As a matter of practice rather than constitutional duty, the President proposes a nexus between expenditures and revenues in the budget he sends to the Congress. Depending in part upon the then-existing political circumstances, the Congress either has adopted a budget based in large measure on the President's proposal, or has used the President's budget proposal as a point of departure for the Congress' budgetary efforts. Most recently, the President's suggested budget has been summarily rejected by the Congress. Having no constitutional constriction requiring the balancing of expenditures with revenues, and having rejected any increase in the President's statutory budget authority, the Congress attempted self-imposed budget balancing efforts. However, despite conscientious hard work, those efforts did not succeed.

The division of labor in Congress between those committees charged with authorizing expenditures and those charged with appropriating funds was contemplated as a bilateral plan for balancing revenues and expenditures. That plan soon deteriorated, however, as authorizing committees made an "end run" around the appropriations committees by appropriating funds in the guise of merely authorizing entitlement program expenditures. Unchecked by the appropriations committees, entitlement programs approved by the authorizing committees increased exponentially the government's required expenditures. Federal deficits mounted.

Given this lack of Congressional budget restraint, the President attempted to enforce budget-balancing by impounding funds in the early 1970's. Congress responded with the Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297 (codified at

2 U.S.C. §§ 681-688 (1974)). That statute called for a two-tiered approach whereby an initial concurrent budget resolution set budgetary targets for total federal revenues, expenditures, and the deficit or surplus. While the first resolution served only as an advisory guide to the authorizing committees, a second concurrent resolution was intended to establish binding ceilings on expenditures and floors under revenues. Once again, however, despite the tireless efforts of the Senate and House Budget Committees, the Congress found ways to bypass its own best budgetary intentions. The authorizing committees often found it expedient to avoid the goals of the first resolution. Moreover, the second resolution was seldom passed at all in the regular budget cycle, and, in any event, its enforcement mechanisms could be circumvented easily by majority vote or by other procedural means.

Many other efforts at budget restraint were tried and failed. The Congress enacted debt limit legislation, but now is forced to circumvent that self-imposed restraint by increasing, at least annually, the legal borrowing limit to (1) permit the borrowing necessitated by the growing deficit and (2) avoid bringing the federal government to a halt for lack of money. In addition, because individual appropriations bills increasingly are being delayed, or not passed at all, many federal agencies and programs now are funded by continuing resolutions, usually enacted at the eleventh hour or later. Thus, the government moves from financial crisis to financial crisis, with government agencies having to be shut down until the debt limit is increased or a continuing resolution is passed to provide necessary funding for operations.

In yet another budget-balancing effort, a constitutional amendment requiring a balanced budget was passed by the Senate. That amendment was not dealt with by the House. In a more recent effort to impose restraint on the budgetary process, the President repeatedly has called

for line-item veto power over appropriations. He has not received that power, and the budget crisis continues.

Given the complete absence of a legislative solution to the deficit crisis, more than thirty states have called for a constitutional convention to consider a balanced budget amendment. If convened, there is some doubt whether such a convention could be limited only to the balanced budget issue, and many are uncertain where such a convention might lead. Nevertheless, as the number of states calling for such a convention approached the required number, Congress remained paralyzed, unable to make the hard political choices necessary for self-imposed budget restraint.

The Act, the validity of which is at issue here, was enacted by the Congress and approved by the President against this historical backdrop. It is the first and only realistic action-forcing mechanism which ultimately will require the Congress to limit government expenditures to an amount no greater than revenues. The automatic spending reduction mechanism in the Act is the critically-needed catalyst, the "Sword of Damocles," which will force the Congress to balance the budget. The same forced budget restraint is not accomplished by the Act's alternative or "fallback" procedure, whereby the calculated budget reductions are reported to, and voted on, by Congress. That alternative procedure will result only in the same legislative deadlocks that always have precluded effective deficit reductions in the past. The invalidation of the automatic spending reduction mechanism thus would deal a fatal blow to any hope of deficit reduction under the Act.

The Framers of the Constitution presumably assumed that, without constitutional mandate, the Congress and the President could strike a balance between the government's spending powers and its power to generate reve-

nues. Recent history has proven the Framers to have been overly optimistic. They had no reason to anticipate a deficit crisis of the current proportions. The Act's automatic spending reduction mechanism represents the only realistic hope of a required balance between revenues and expenditures. It requires the Congress and the President to balance the federal budget.

In many respects, the Congress is the culprit and the Act is Congress' way of putting its own house in order. However, as a matter of political reality, it should not be assumed that invalidating this Act will result in new and different legislation accomplishing budget reform. It is simply not realistic to send the Congress back to the drawing board to try again to enact another debt-reduction measure. It has taken the Congress twenty years to make the hard political choices in this Act necessary to balance the budget. It is highly doubtful that the political risks required to pass the Act will be taken again by sufficient numbers in the Congress to permit passage of some alternative budget-balancing scheme.

In addition to considering the decisions of this Court, which clearly support the Act's validity, the presumption of constitutionality must play a major role in the Court's review of this legislation. By invalidating the automatic spending reduction provisions of the Act, the District Court not only failed to afford the Act the highest presumption of constitutionality, it stood that presumption on its head. The constitutionality of the Act can be confirmed by drawing reasonable inferences from the Constitution and this Court's decisions concerning the removal power and reasonably characterizing the nature of the Comptroller General's fact-finding tasks under the Act. The issue must be decided in favor of the validity of the statute.

II. THE LIMITED POWER OF THE CONGRESS TO REMOVE THE COMPTROLLER GENERAL, SUBJECT TO PRESIDENTIAL VETO, IS CONSTITUTIONALLY PERMITTED.

A. The Decisions of This Court Permit Congressional Participation in The Removal of The Comptroller General.

The Appointments Clause of the Constitution provides for the appointment of Officers of the United States by the President with the advice and consent of the Senate.[5] While the Appointments Clause defines the mode of selecting "Officers of the United States," [6] the Constitution

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[5] The Appointments Clause of the Constitution provides:

"[*The President*] *shall nominate, and by and with the Advice and Consent of the Senate, shall appoint* Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and *all other Officers of the United States,* whose Appointments are not herein otherwise provided for, and *which shall be established by Law*: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. Art. II, § 2, cl. 2 (emphasis added).

[6] Although the District Court found it unnecessary to decide the question, J.A. 61 n.23, there can be no doubt that the Comptroller General is an "Officer of the United States," rather than a "legislative officer." The Comptroller General is placed in office in accordance with the Appointments Clause—by appointment of the President with the advice and consent of the Senate. 31 U.S.C. § 703(a)(1) (1982). Appointment pursuant to the Appointments Clause is indicia of an Officer of the United States. See *Buckley* v. *Valeo,* 424 U.S. 1, 128 n.165 (1976) (noting appointment of Comptroller General in accordance with Appointments Clause); *Burnap* v. *United States,* 252 U.S. 512, 516 (1920) (officer status is "determined by the manner in which Congress has specifically provided for the . . . appointment thereto"). Considering the numerous important responsibilities imparted to that office, the Comptroller General also must be viewed as "exercising significant authority pursuant to the laws of the United States," the functional test articulated by the Court in *Buckley,* 424 U.S., at 126, for status as an Officer of the United States. The responsibilities of the

does not expressly address the manner of their removal. Indeed, the only language in the Constitution relating to the removal of Officers of the United States is that conferring on the Congress, and not the President, the power to subject "all Civil Officers of the United States" to impeachment for treason and other high crimes and misdemeanors. U.S. Const. Art. II, § 4; Art. I, § 2, cl. 5; Art. I, § 3, cl. 6.

Absent any express constitutional mandate concerning the removal power, a trilogy of the Court's decisions provides the framework for the removal power analysis. In the first of these three cases, *Myers* v. *United States*, 272 U.S. 52 (1926), the Court considered a statute permitting removal of a postmaster by the President with the advice and consent of the Senate. A divided Court held that the Congress could not constitutionally limit the President's power of removal with respect to that officer. The lengthy decision in *Myers*, which includes expansive language concerning Presidential removal power, was written by Chief Justice Taft, himself a former President. Chief Justice Taft's conclusion, that the removal power is constitutionally lodged exclusively in the President as a necessary incident of his power to appoint,[7] relies heavily upon an interpretation of the debates in the First Congress.[8] 272 U.S. at 164-176. In those debates, which are

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Comptroller General are not limited to "duties only in aid of those functions that Congress may carry out by itself," nor are those duties "sufficiently removed from the administration and enforcement" of law as to characterize them as purely legislative in nature. *Id.*, at 139. See *infra* n.12.

[7] Pursuant to the Appointments Clause, the appointment power is in fact exercised by the President and the Congress concurrently in that the Senate must advise and consent to the President's appointment. If removal power must necessarily share the same locus as the appointment power, then removal power should presumably be concurrently exercised as well. See L. Tribe, American Constitutional Law 188 & n.13 (1978).

[8] Chief Justice Taft also relied upon the duty imposed on the President by the Constitution to see that the laws are faithfully

known in constitutional literature as the "Decision of 1789," the Congress ultimately acquiesced in the authority of the President to remove the Secretary of Foreign Affairs. Reliance on those debates in the first Congress as authority for the proposition that removal power is constitutionally vested solely in the President is strongly criticized by many scholars.[9]

Regardless of the validity of Chief Justice Taft's conclusions, the *Myers* holding was restricted severely nine years later by the unanimous decision in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935). Rather than assuming that the constitutional power to remove is lodged exclusively with the President as an incident of the power to appoint, the Court in *Humphrey's Executor* applied a functional test to determine the locus of removal power. First, the Court focused on the functions of the officer at issue, a member of the Federal Trade Commission ("FTC"), as "neither political nor executive, but predominantly quasi-judicial and quasi-legislative." *Id.*, at 624. The Court recognized that independent agencies,

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executed. *Id.*, at 163-164. Scholars have suggested that this reliance on the "faithfully executed" clause is suspect because (1) that clause involves language of duty rather than a conferral of power and (2) the executive duty to enforce the laws does not provide the President with unfettered discretion to determine the means of carrying out that duty. L. Tribe, *supra* n.7, at 187 n.7; Corwin, Tenure of Office and The Removal Power Under The Constitution, 27 Colum. L. Rev. 353, 384 (1927). See *Myers*, 272 U.S., at 177 (Holmes, J., dissenting).

[9] See C. Miller, The Supreme Court and The Uses of History 61-68, 205-210 (1969) (vote in the Senate concerning the removal issue was tied, with the Vice President casting the deciding vote); Corwin, *supra* n.8, at 360-369 (less than a third of the members of the House were of the opinion that the Constitution vested the President alone with removal power). See also R. Berger, Congress v. The Supreme Court 146-150 (1969) (the Congressional debate is not conclusive as a statement of constitutional position on removal power); L. Tribe, *supra* n.7, at 186 n.6 (even if the debates suggested a broad removal power, such conclusion was probably no more than a statement of policy rather than a constitutional command).

such as the FTC, may perform executive functions which are "collateral" to the discharge of their predominantly quasi-legislative or quasi-judicial powers. *Id.*, at 628 & n.*. When the functions of the office are predominantly quasi-legislative or quasi-judicial, the Court reasoned, Presidential removal power does not necessarily flow from the Constitution. *Id.*, at 629. The Court in *Humphrey's Executor* expressly limited the *Myers* holding to "purely executive" officers whose duties are "restricted to the performance of executive functions [and who are] charged with no duty at all related to either the legislative or judicial power." *Id.*, at 627.[10]

Having determined that the Commissioner was not a "purely executive" officer, the Court turned to the legislative history of the FTC Act, which clearly revealed the Congressional intent to maintain the separation of that body from political control. As the Court recognized, the Congress contemplated that the FTC would act as a "body of experts" remaining "independent of executive authority." *Id.*, at 625. Based on the Congressional concern that the FTC operate independently from the President, the Court concluded that the Congress had the constitutional authority to restrict the President's removal power. Although the precise question presented was the power of the Congress to preclude the President from discharging the FTC Commissioner without cause, *Humphrey's Exec-*

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[10] The Court likewise confined the significance of the "Decision of 1789" as follows:

"[T]he office under consideration by [the first] Congress [*i.e.*, Secretary of Foreign Affairs] was not only purely executive, but the officer one [sic] who was responsible to the President, and to him alone, in a very definite sense. A reading of the debates shows that the President's illimitable power of removal was not considered in respect of other than executive officers." *Humphrey's Executor*, 295 U.S., at 631. See Corwin, *supra* n.8, at 365-366. James Madison, who participated in the "Decision of 1789" subsequently posited that a different removal rule should apply to the Comptroller of the Treasury due to the nature of his functions. *Id.*, at 366-367.

utor clearly refutes the notion that the power to remove necessarily follows the power to appoint in all instances. Under the *Humphrey's Executor* rule, the question of Congressional removal power depends "upon the character of the office." *Id.*, at 631. Those offices involving functions properly characterized as "purely executive" in nature invoke illimitable Presidential removal power under *Myers*. Congressional removal authority over those officers exercising functions not "purely executive" in turn depends upon Congressional intent that the officer act independently from the President.

In the final decision of the removal powers trilogy, *Wiener* v. *United States*, 357 U.S. 349 (1958), the Court implied a Congressional restriction on the ability of the President to remove even absent a statute addressing the mode of removal. Implementing the functional test for removal power established in *Humphrey's Executor*, the Court first determined that the office of War Claims Commissioner was not a "purely executive" office because its duties were quasi-judicial in nature. *Id.*, at 354. Examining the relevant legislative history, the Court found a Congressional intent for independence from the Executive because the initial versions of the pertinent legislation had conferred the resolution of war claims on the Federal Security Administrator, "indubitably an arm of the President," *ibid.*, while the legislation finally enacted established the War Claims Commission as a body independent of the President. Based on that functional analysis and determination of Congressional intent, the Court implied a preclusion of Presidential removal power as to the War Claims Commissioner. *Id.*, at 356.

The *Wiener* decision articulates the dual functional distinction drawn in *Humphrey's Executor* as follows:

> "[*Humphrey's Executor*] drew a sharp line of cleavage between officials who were part of the Executive establishment and were thus *removable by virtue of the President's constitutional powers*, and those who

> are members of a body 'to exercise its judgment without the leave or hindrance of any other official or any department of the government,' 295 U.S., at 625-626, *as to whom a power of removal exists only if Congress may fairly be said to have conferred it.*" *Id.*, at 353 (emphasis added).

The Court in *Wiener* thus contrasted the "President's constitutional powers" of removal, which apply to purely executive officers under the limited *Myers* rule, with the existence of such Presidential removal power only as conferred by the Congress. The latter rule applies to those officers who perform predominantly quasi-legislative and quasi-judicial functions under the rationale of *Humphrey's Executor.* This language by the Court in *Wiener* can only be construed to lodge removal power in the Congress with respect to those not "purely executive" officers who come within the holding of *Humphrey's Executor.*[11]

1. *The Office of Comptroller General is Not "Purely Executive" in Nature.*

Application of the functional test suggested by *Humphrey's Executor/Wiener* clearly reveals that the Comptroller General constitutionally may be subjected to Congressional removal power. Like the FTC Commissioner in *Humphrey's Executor*, the Comptroller General performs a mix of functions that partake predominantly of the legislative power, but also include functions of a judicial and executive nature.[12] As even the District Court

[11] See *Buckley* v. *Valeo*, 424 U.S., at 276 (White, J., concurring in part and dissenting in part) (officers such as FTC are "immune from removal by the President except on terms specified by Congress"); L. Tribe, *supra* n.7, at 189 n.18 (referring to Congress' removal power); Burkoff, Appointment and Removal Under The Federal Constitution: The Impact of Buckley v. Valeo, 22 Wayne L. Rev. 1335, 1409 (1976) (*Wiener* decision "divested the President of any removal power *whatever*").

[12] The District Court inaccurately posited that all of the functions delegated to the Comptroller General under law, aside from those assigned under the Act, are legislative in character. J.A. 71

conceded, consideration of all of the functions of the office compels the conclusion that the Comptroller General is not a "purely executive" officer within the meaning of the *Myers* rule requiring Presidential removal power. J.A. 71.

2. *The Congress Clearly Intended That The Comptroller General Be Independent of The President.*

Having eliminated application of the restricted exception in *Myers* for "purely executive" officers, *Humphrey's Executor* and *Wiener* require that the analysis next turn to legislative history to determine whether Congress intended that the Comptroller General act independently of the President. The answer is yes. The General Accounting Office ("GAO"), which the Comptroller General heads, was established by the Congress as "an instrumentality of the United States Government independent of the executive departments." 31 U.S.C. § 702(a) (1982). The GAO has been described by Congress and the Court as an independent, non-political, non-partisan agency.[13] As the District Court's decision recognizes, J.A. 51, the GAO's expertise in accounting and economic calculations makes it a body of experts like other independent agencies.

Moreover, the legislative history of the Act, just like that in *Wiener*, reveals that the Congress rejected a pro-

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& n.29. In addition to his many quasi-legislative functions cited by the District Court, the Comptroller General, an officer historically first located within the Treasury Department, also carries out functions partaking of executive and judicial qualities. See, e.g., 31 U.S.C. § 3323(a)(3) (1982) (countersigning with Secretary of Treasury warrants for disbursements of public funds); 31 U.S.C. §§ 3526, 3702 (1982) (settling claims of or against the United States); 31 U.S.C. § 3717(h) (1982) (prescribing standards for collections of debts owed the United States); 31 U.S.C.A. §§ 3551-3556 (1985 West Cum. Pocket Part) (adjudicating protests of government procurement statute violations).

[13] General Accounting Office, Functions of The Accounting Office, S. Doc. No. 96, 87th Cong., 2d Sess. 1 (1962). See *Bowsher* v. *Merck & Co.*, 460 U.S. 824, 844 (1983).

vision that would have placed the fact-finding tasks in the control of the OMB, an office considered by the Congress to be an arm of the President.[14] The legislation as ultimately enacted assigns the fact-finding tasks to the Comptroller General precisely because the Congress intended that those tasks be performed independently of the President. Rather than placing the fact-finding functions in the hands of the OMB, an arm of the President, or under the direction of the CBO, whose head is appointed and removable solely by the Congress, the Act strikes a compromise by delegating those functions to the Comptroller General, who is appointed by the President but is removable by the concurrent action of both the Congress and the President.

3. *The District Court Erroneously Focused Only on The Tasks Assigned Under The Act.*

The foregoing analysis places the removal powers issue presented here squarely within the *Humphrey's Executor/Wiener* rationale, requiring that the constitutionality of the Act be confirmed. The District Court, however, strained to take the Comptroller General outside of the *Humphrey's Executor* rule, and thus to find constitutional infirmity in the Act.[15] By focusing its functional analysis

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[14] See Democratic Study Group, Special Report: The Gramm-Rudman Proposal, reprinted in 131 Cong. Rec. S12974, 12978 (daily ed. Oct. 9, 1985); 131 Cong. Rec. H9598 (daily ed. Nov. 1, 1985) (remarks of Rep. Brooks); The Budget Outlook and Its Economic Implications: Hearings Before The House Comm. on The Budget, 99th Cong., 1st Sess. 39 (1985) (remarks of Rep. Gray); 131 Cong. Rec. H9597 (daily ed. Nov. 1, 1985) (Rep. Rostenkowski) ("Under Gramm-Rudman [as originally proposed], the President could orchestrate the cuts through OMB").

[15] The District Court's failure to find *Humphrey's Executor* controlling must be viewed as arising in part from that Court's dissatisfaction with that decision. Indeed, the District Court recites numerous reasons for its disagreement with the decision: for example, *Humphrey's Executor* reflects the politics of its day and the Supreme Court's hostility towards President Roosevelt; independent

solely on the tasks performed by the Comptroller General under the Act, and by characterizing those particular functions as purely executive, the District Court returned the analysis to the rigid, and now limited, *Myers* rule, requiring illimitable Presidential removal power. While proclaiming that this case "falls neatly between the two stools of *Myers* and *Humphrey's Executor*," J.A. 71, the District Court actually seats its conclusion squarely upon the *Myers* rule.[16]

Despite the focus by this Court in *Humphrey's Executor* on the overall functions of the officer, the District Court's decision rejects that "admixture" approach as not "congressionally knowable" or "judicially manageble." J.A. 74. Instead, the District Court's analysis is a rigid, two-part test: if (1) the *particular* function of the officer, examined in isolation from his other duties, is "purely executive," and (2) the officer performing that function is not removable by the President, then the separation of powers doctrine is violated. Carried to its logical conclusion, the rigid separation of powers analysis applied by the District Court would call into question the constitutionality of the performance by *any* officer of *any* branch of government of *any* one function partaking "purely" of the powers of another branch. The separation of powers doctrine does not require this sort of "hermetic

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agencies constitute a headless fourth branch of government and do not fit within the constitutional scheme; and independent agencies no longer function as independent experts and no longer require the protection from political intervention intended by *Humphrey's Executor*. J.A. 68-69. None of these indictments of *Humphrey's Executor* either requires the Court to disregard its prior holdings or weighs in favor of invalidation of the balanced budget legislation at issue here.

[16] This is apparent from the District Court's dicta indicating its view that the President must have illimitable removal power over the Comptroller General before that officer could perform the fact-finding tasks assigned him under the Act. J.A. 61.

sealing off of the three branches of Government from one another . . . ." *Buckley* v. *Valeo,* 424 U.S. 1, 121 (1976).

Application of the rigid test fails to take account of the realities of modern government in which many officers, and particularly officers in independent agencies such as the Comptroller General, perform functions which necessarily partake of legislative, judicial and executive qualities.

As Justice Jackson aptly noted:

> "[t]he actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context. While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 635 (1952) (Jackson, J., concurring), *quoted in part in United States* v. *Nixon,* 418 U.S. 683, 707 (1974).

In the context of a massive federal government called upon to perform the innumerable complex functions required by a modern society, "[a]ny notion that the Constitution bans any admixture of powers that might be deemed legislative, executive, and judicial has had to give way." *Buckley* v. *Valeo,* 424 U.S., at 281 (White, J., concurring in part and dissenting on other grounds). The separation of powers doctrine must admit of some overlap between the branches in the context of the present removal issue. Such a permissible overlap was recognized in *Humphrey's Executor,* where the Court expressly noted that those non-"purely executive" officers contemplated by its holding may engage in executive functions that are collateral to their quasi-legislative and quasi-judicial duties. 295 U.S., at 628 & n.*.

The *Humphrey's Executor* functional analysis considers all of the duties performed by the officer. Regardless of the characterization of the particular tasks assigned the Comptroller General in the Act as "purely executive" or otherwise, no violation of the separation of powers doctrine is implicated. Those paritcular tasks are properly considered as mere adjuncts to the other quasi-legislative functions of the office, which require the Comptroller General to engage in economic calculations, bookkeeping and accounting duties.

4. *The Comptroller General's Functions Under The Act are Not "Purely Executive."*

Even assuming that the functional analysis can properly be focused solely on the tasks delegated to the Comptroller General under the Act, the practical realities of the budgetary process belie any characterization of those duties as solely executive. The Act solves the Congress' problem presented by its inability to engage in budgetary discipline by requiring the Congress to meet certain specified budget deficit reduction levels. It is in large measure a delegation, albeit a clearly permissible one, of legislative powers. It is, however, an extremely limited delegation. The Congress already has specified the required spending cuts in the Act itself, leaving the Comptroller General with only the task of calculating those reductions based on the Act's formula.

By making those estimates and calculations, the Comptroller General is merely "filling in and administering the details" of the Act pursuant to the standards established in the statute. *Humphrey's Executor*, 295 U.S., at 628. Those duties thus are like the quasi-legislative fact-finding engaged in by other independent agencies. The Comptroller General's consideration of the reports of the OMB and CBO may be characterized in part as requiring an adjudication of sorts between the two, thus giving a quasi-judicial character to the Comptroller Gen-

eral's duties. Finally, those functions doubtless also place the Comptroller General in a limited interpretive role, since he necessarily must construe the Act in order to make the fact-findings required of him under the Act. It thus should be clear that the Comptroller General's tasks under the Act are of a mixed character. They have quasi-legislative, quasi-judicial, and quasi-executive qualities. They can in no way, however, be properly pigeonholed only within the purely executive category.

The District Court characterizes the Comptroller General's fact-finding functions as "purely executive" because the Act denies discretion to the President to alter the Comptroller General's calculations of the spending reductions. That argument proves too much. If the legislative inertia regarding the budget restraint could be overcome, the Congress certainly could pass legislation, with the approval of the President or by overriding his veto, calling for spending cuts by specific amounts per program needed to reach a balanced budget. The Congress thus could make the calculations and enact spending cuts based on those numerical results, leaving the President no discretion but to enforce those cuts. The constitutionality of such a deprivation of Presidential discretion in enforcing the required spending reductions cannot be doubted. Precisely the same thing is required by the Act—the Congress has legislated specific spending cuts per program, only replacing the specific figures for such reductions by a formula to be calculated by the Comptroller General. The restriction of Presidential discretion in enforcement of the Act is accomplished by Congress' enactment of the Act in the first instance, and not by any subsequent calculations performed by the Comptroller General. The mere deprivation of Presidential discretion cannot constitute the Comptroller General's calculation an "executive" act, nor can it imply a separation of powers violation.[17]

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[17] The same analysis invalidates the District Court's conclusion that the Comptroller General's fact-finding functions constitute a

B. The Limited Congressional Power to Participate in The Removal Process Does Not Unconstitutionally Impinge on The Appointments Power of The Executive.

Because the Comptroller General's functions, whether considered in toto or in isolation only as to those tasks assigned in the Act, are not "purely executive," this Court's decisions indubitably hold that the Congress may constitutionally restrict or confer the power to remove that officer. It remains only to determine whether the Act violates the separation of powers doctrine because the independent agent selected to perform the fact-finding tasks is, by a separate statute passed sixty-five years earlier, made removable by the concurrent action of the Congress and the President. The District Court assumed that limited Congressional participation in the removal process runs afoul of the adage that the power of removal is an incident of the power of appointment. The "tyranny of adages," however, presents as "fertile [a] source of perversion in constitutional theory" as does the "tyranny of labels" decried by Justice Cardozo in *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1934). Indeed, this Court's holding in *Humphrey's Executor* rejects that notion, proving that the constitutional power to remove does not follow the constitutional power to appoint in all instances.

By juxtaposing in *Wiener* the "*President's* constitutional" power of removal as applied in *Myers*, with the power of removal under *Humphrey's Executor*, which exists "only if *Congress* may fairly be said to have conferred it," this Court inferred that there is no constitutional Presidential removal power in the latter instance.

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before-the-fact prescription of the President's executive power comparable to the legislative veto found unconstitutional in *Immigration & Naturalization Service v. Chadha*, 462 U.S. 919 (1983). Prior Congressional prescription of Presidential discretion in enforcement of law clearly presents no constitutional infirmity such as that found with respect to the legislative veto.

Wiener, 357 U.S., at 353 (emphasis added). Where it is the province of the Congress to confer, or not to confer, the authority to remove, constitutional removal power can only be said to be lodged in some measure with the Congress, and not solely with the President. The power of removal being lodged in part with the Congress, the assertion by the Congress of a limited right to exercise that power can in no way imply any constitutional infirmity.

It does not follow from the constitutional authority of the Congress to participate in the removal of the Comptroller General in this case, however, that the Comptroller General serves only at the whim of the Congress. The relevant statute permits removal only for certain specified causes.[18] The Congress can exercise such removal only by joint resolution, which is subject to Presidential approval or veto.[19] The Congress clearly does not "control" removal where the President consents to and signs, or otherwise fails to veto the joint resolution. In that instance, it is the President's action that makes removal effective. If the President disapproves of the removal, Congressional "control" results only by an override of that veto, requiring a two-thirds vote of all members of Congress. It is no easier for the Congress to remove, over Presidential veto, the Comptroller General than it is for the Congress to pass any other law vetoed by the Executive. The Congress' constitutional capacity to exercise a limited removal power over the Comptroller General, subject to Presidential veto, is no different from the obvious Congressional authority to enact legislation, subject to

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[18] The removal statute originally was enacted in the Budget and Accounting Act of 1921, ch. 18, 42 Stat. 20, 23-24 (1921). As amended, it is now codified at 31 U.S.C. § 703(e)(1) (1982).

[19] It should be noted that the Congress has never attempted to exercise the power to remove a Comptroller General in the sixty-five years since the enactment of the provision in the Budget and Accounting Act of 1921 authorizing such removal. This fact should weigh heavily against the District Court's assumption that the Comptroller General would fear Congressional removal, and thus, must be considered subject to Congressional "control."

Presidential veto, abolishing the General Accounting Office of which the Comptroller General is head. With respect to non-purely executive offices, the constitutionality of the latter action establishes in like manner the constitutionality of the former.

In addition to forcing the Congress to put its own budgetary house in order, the Act represents a political accommodation between the Legislative and Executive Branches concerning the handling of their joint responsibilities in budgetary legislation. The delegation of the fact-finding tasks to the OMB, a purely executive office, or to the CBO, a purely legislative one, was rejected in favor of a compromise between the two branches. Those tasks were instead assigned to an independent agent, the Comptroller General. It is fitting that the key player in the automatic spending reduction scheme, the Comptroller General, should be subject to removal by joint action in which both the Congress and the President have a voice. Constitutional symmetry in the locus of the appointment and removal power is apparent and appropriate—the Congress and the President participate in both the appointment and removal of the independent agent whose functions under the Act bridge the gulf between the two branches encountered in the deficit crisis.

Affirming the constitutionality of the Comptroller General's functions under the Act does not imply a Congressional removal power as to all officers of the United States.[20] Nor does the joint participation by the Congress and the President in the removal process here indicate a deprivation by one branch of core functions representing the very essence of the powers assigned by the Constitution to another branch. See *Northern Pipeline Construction Co.*

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[20] Officers performing exclusively executive functions, such as an officer solely engaged in prosecutorial functions, must be subject to Presidential appointment and removal, at least for cause. See Baker, The Proposed Judicially Appointed Independent Office of Public Attorney: Some Constitutional Objections and An Alternative, 29 Sw. L.J. 671, 675 (1975).

v. *Marathon Pipe Line Co.*, 458 U.S. 50, 74 (1982). This case simply does not involve the encroachment of one branch upon the powers reserved to another. The functions performed by the Comptroller General are by no proper measure accurately described as core executive functions—they typify instead the mixed qualities representative of all three branches. The Congress has not engaged in any wholesale deprivation of the executive function merely by granting a fact-finding role in the budgetary process to an officer who is subject to removal only under very limited circumstances, and who, under this Act, engages in functions partaking of the legislative, judicial and executive powers.

CONCLUSION

The Act is a unique solution to a unique problem of constitutional omission—the absence of any mandatory constitutional relationship between the spending power and the revenue-generating power of the federal government. In terms of the practical realities of government, it represents the last available means to achieve such a balance absent a new constitutional mandate. It is the Congress' way of dealing with the hard political choices that have prevented budgetary restraint in years past. On this largely political question, great deference to the considered judgment of the Legislative and Executive Branches is required. The Constitution should not be applied as a straightjacket to preclude a flexible approach to solve a unique, but critical problem facing our government. The constitutionality of the Act should be affirmed. The decision of the District Court should be reversed.

Respectfully submitted,

HOWARD H. BAKER, JR.*
VINSON & ELKINS
1101 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 862-6500
Amicus Curiae

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* Counsel of Record